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# SELECTED
# CASES ON EQUITY

BY

GEORGE L. CLARK
*Author of "Principles of Equity"*

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PART I—CHAPTERS I TO IV.

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# TABLE OF CONTENTS

## PART I.

### CHAPTER I.

Introduction ........ 1

### CHAPTER II.

Specific Performance of Contracts ........ 30
Section 1. In General ........ 30
Section 2. Affirmative Contracts ........ 39
Section 3. Negative Contracts ........ 65
Section 4. Relief For and Against Third Persons—Equitable Servitudes ........ 83
Section 5. Consequences of Right of Specific Performances ........ 120
Section 6. Partial Performance with Compensation ........ 144
Section 7. Defenses ........ 152

### CHAPTER III.

Specific Reparation and Prevention of Torts ........ 225
Section 1. Waste ........ 225
Section 2. Trespass ........ 237
Section 3. Private Nuisance ........ 255
Section 4. Disturbance of Private Easements ........ 285
Section 5. Obstruction of Public Rights ........ 296
Section 6. Public Nuisance ........ 300
Section 7. Common Law Copyright—Statutory Monopolies ........ 316
Section 8. Interference with Trade Interests—Fraud ........ 331
Section 9. Interference with Contract and Business Relations ........ 344
Section 10. Defamation—Interference with Privacy ........ 364
Section 11. Interference with Domestic, Social, and Political Relations ........ 381

### CHAPTER IV.

Prevention of Crimes and Criminal Proceedings ........ 391



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# TABLE OF CASES


Adams, Taylor v. 228
Amer. Law Book Co. v. Edward Thompson Co. 344
Amer. Soc'y etc., Davis v. 393
Anaconda, etc. Co., Bliss v. 283
Appleton, Robinson v. 91
Arizona Ins. Ag'y, Bisbee v. 396

Babcock v. McCamant 22
Badger v. Boardman 98
Baghurst, Nibert v. 158
Bailey v. Duncan 133
Baker, Rhoten v. 23
Baltimore Coal Tar Co., Equitable Gas Co. v. 54
Bangor, etc. R. R., Goding v. 211
Barton, Lippincott v. 234
Bastable, Pearce v. 84
Bennet, Lawes v. 130
Betts v. DeVitre 324
Birch, Hercy v. 28
Bisbee v. Arizona Ins. Ag'y 396
Bishop v. Newton 187
Blew v. McClelland 139
Bliss v. Anaconda etc. Co. 283
Block v. Morrison 136
Boardman, Badger v. 98
Bodwell v. Bodwell 181
Boeckler v. Mo. Pac. Ry. Co. 245
Brande v. Grace 287
Brewer v. Marshall 113
Bridgman, Sturges v. 261
Brown v. Smith 199
Brown, Wannamaker v. 149
Buchan, Marsh v. 198
Buck, Tuttle v. 360
Buckley, Hill v. 145
Buckland v. Hall 182
Bull, Logan & wife v. 223
Burnham, Fleming v. 155
Burrell, Krehl v. 292
Byrnes, Jackson v. 66

Caldwell v. Depew 206
Campbell v. Gilman 5
Carpenter v. Mutual Co. 48
Caton v. Caton 163
C., B. & Q. R. R. v. Reno 208
Charless, Rankin v. 255
Cheuvronts, Dees v. 249
Chubb v. Peckham 213
Clegg v. Hands 101
Cloyd v. Trotter 9
Cobb v. Saxby 294
Cohn, Day v. 195
Coles v. Feeny 122
Combs v. Fisher 141
Com'th v. McGovern 306
Continental Paper Bag Co. v. Eastern Paper Bag Co. 326
Cooper v. Jarman 125
Corbin v. Tracy 43
Cornellier v. Haverhill Shoe Mfrs. Ass'n 353
Crabtree v. Welles 157
Crisp, Joyner v. 147
Crocker v. Manhattan Life Ins. Co. 244
Crossett, Owens v. 253

Daly v. Smith 72
Daniel v. Ferguson 290
Daniels v. Davison 83
Darst v. Kirk 30
Daughetee, Ohio Oil Co. v. 225
Davenport, Paddock v. 38
Davis v. Am. Soc'y etc. 393
Davis, Sawyer v. 264
Davison, Daniels v. 83
Day v. Cohn 195
Day, Sprake v. 127
Dees v. Cheuvronts 249
DeHeld, Soltau v. 275
Depew, Caldwell v. 206
DeVitre, Betts v. 324
Dickenson v. Grand Junction Canal Co. 100
Dills v. Doebler 35
Dockstader v. Reed 81
Doebler, Dills v. 35
Dr. Miles Medical Co. v. Park & Sons Co. 115
Dressel v. Jordan 222
Duffy v. Kelly 178
Duncan, Bailey v. 133
Durrett v. Hook 205

Eastern Paper Bag Co., Continental Paper Bag Co. v. 326
Eaton v. McCall 6
Edelen, Hampson v. 136
Edward Thompson Co., Amer. Law Book Co. v. 344

Edwards v. West ............ 142
Ellice, Potter v. ............ 124
Ellis v. K. C. R. R. ............ 269
Emack v. Kane ............ 364
Engle v. Walsh ............ 385
Equitable Gas Light Co. v. Baltimore Coal Tar Co. ............ 54
Everett v. Paschall ............ 300

Feeny, Coles v. ............ 122
Ferguson, Daniel v. ............ 290
Fessler v. Town of Union ............ 296
Fisher, Combs v. ............ 141
Flansburg, Powers v. ............ 391
Fleming v. Burnham ............ 155
Fobes, Leach v. ............ 41
Foote, Parker & Edgarton v. ............ 285
Foster v. Kimmons ............ 37
French, Webster v. ............ 193
Fuelle, Lohse Pat. Door Co. v. ............ 350
Fullerton, Pomeroy v. ............ 188

Gartrell v. Stafford ............ 39
Georgia v. Tennessee Copper Co. 309
Gerard v. Lehigh Stone Co. ............ 173
Gibson, Whatman v. ............ 91
Giles v. Walker ............ 259
Gilman, Campbell v. ............ 5
Gladville v. McDole ............ 167
Goding v. Bangor, etc. R. R. ............ 211
Gottschalk v. Stein ............ 46
Gould v. Partridge ............ 104
Grace, Brande v. ............ 287
Grand Junction Canal Co., Dickenson v. ............ 100
Green v. Green ............ 176
Great Falls Mfg. Co. v. Worster 12
Gruban, Kirchner v. ............ 79
Guard v. Whiteside ............ 65
Gupton v. Gupton ............ 85
Gwathney v. Stump ............ 1

Hale v. Hale ............ 161
Hall, Buckland v. ............ 182
Hamilton-Brown Shoe Co. v. Saxey ............ 346
Hammond, Port Royal Co. v. ............ 20
Hampson v. Edelen ............ 136
Hands, Clegg v. ............ 101
Hanson, Johnson v. ............ 173
Harper v. Virginian Ry. Co. ............ 60
Harris, Munden v. ............ 371
Hartman v. Wells ............ 93
Haskins v. Ryan ............ 316
Hatton v. K. C. etc. R. R. ............ 254
Haverhill Shoe Mfrs. Ass'n, Cornellier v. ............ 353
Haverty, Murray v. ............ 232
Hawarden v. Y. & L. Coal Co. 357
Hellriegel v. Manning ............ 138
Hercy v. Birch ............ 28
Herrick, Morrison v. ............ 160
Hetfield v. Willey ............ 200
Hill v. Buckley ............ 145
Hodgdon, Mansfield v. ............ 153
Hoffman, Tabor v. ............ 331
Home Land Co., McNamara v. ............ 42
Hook, Durrett v. ............ 205
Horse Shoe Club v. Stewart ............ 400
Horsley, Woolums v. ............ 153
Howley, Kearns v. ............ 387
Hoyt v. Tuxbury ............ 192
Hughes, Webb v. ............ 196

Isaacs v. Skrainka ............ 203

Jackson v. Byrnes ............ 66
Jarman, Cooper v. ............ 125
Jaynes & Co., Regis v. ............ 335
Johnson v. Hanson ............ 173
Jordan, Dressel v. ............ 222
Joyner v. Crisp ............ 147

Kane, Emack v. ............ 364
Kansas City, etc. R. R., Ellis v. 254
Kansas City, etc. R. R., Hatton v. ............ 269
Kavanaugh, Royal League v. ............ 16
Kearns v. Howley ............ 387
Kellar, Watts v. ............ 220
Kelly, Duffy v. ............ 178
Kimmons, Foster v. ............ 37
King v. Smith ............ 231
King v. Stuart ............ 237
Kirchner v. Gruban ............ 79
Kirk, Darst v. ............ 30
Kiser, O'Kane v. ............ 144
Kline Drummond Co., St. Louis Range Co. v. ............ 31
Kosminski, Kuzniak v. ............ 271
Krehl v. Burrell ............ 292
Kuzniak v. Kosminski ............ 271

Ladd v. Osborne ............ 241
Langford v. Pitt ............ 120
Lansdowne v. Lansdowne ............ 235
Lawes v. Bennett ............ 130
Leaycraft, McClure v. ............ 108
Leach v. Fobes ............ 41
Lechmere, Lewis v. ............ 45
Lehigh Stone Co., Gerard v. ............ 173
Lewis v. Lechmere ............ 45
Lincoln, Murphey v. ............ 241
Lippincott v. Barton ............ 234
Logan & Wife v. Bull ............ 223
Lohse Pat. Door Co. v. Fuelle ............ 350
Losee v. Morey ............ 40
Lyons, Pyatt v. ............ 186

McCall, Eaton v. ............ 6
McCamant, Babcock v. ............ 22
McClelland, Blew v. ............ 139
McClure v. Leaycraft ............ 108
McDole, Gladville v. ............ 167

McGovern, Comth v. ---------- 306
McIntyre, Whipple v. --------- 257
McNamara v. Home Land Co. -- 42
Magloughlin, Scott v. --------- 27
Manhattan Life Ins. Co., Crocker v. -------------------------- 244
Manning, Hellreigel v. -------- 138
Mansfield v. Hodgdon --------- 153
Marchant, Roberts v. --------- 123
Marsh v. Buchan ------------- 198
Marshall, Brewer v. ----------- 113
Meves, Thurber v. ------------ 218
Meyer, Ullsperger v. ---------- 216
Meyer, Weis v. -------------- 89
Midgley, Wood v. ------------ 175
Milligan, Nelson v. ----------- 278
Missouri Pac. Ry. Co., Boeckler v. ---------------------------- 245
Morey, Losee v. -------------- 40
Morris v. Morris -------------- 229
Morris v. Parry -------------- 24
Morrison, Block v. ------------ 136
Morrison v. Herrick ----------- 160
Moss & Raley v. Wren ------- 33
Munden v. Harris ------------- 371
Murphey v. Lincoln ---------- 241
Murray v. Haverty ----------- 232
Mutual Co., Carpenter v. ------ 48
Myers, National Life Ins. Co. v. 368

National Life Ins. Co. v. Myers 368
Nelson v. Milligan ------------ 278
Newton, Bishop v. ------------ 187
Newton v. Newton ----------- 129
Nibert v. Baghurst ------------ 158
Nisbett & Potts Contract, In re 95
Norfolk, Peabody v. ---------- 68

Ohio Oil Co. v. Daughetee ---- 225
Ohio Oil Co., State v. --------- 298
O'Kane v. Kiser -------------- 144
O'Neill v. Webb -------------- 55
Osborne, Ladd v. ------------- 241
Overbaugh, Young v. --------- 170
Owens v. Crossett ------------ 253

Paddock v. Davenport -------- 38
Parisette, Savings Bank Co. v. - 150
Park & Sons Co., Dr. Miles Medical Co. v. --------------- 115
Parker & Edgarton v. Foote --- 285
Parkhurst, Warren v. --------- 272
Parry, Morris v. -------------- 24
Partridge, Gould v. ----------- 104
Paschall, Everett v. ---------- 300
Peabody v. Norfolk ----------- 68
Pearce v. Bastable ------------ 84
Peckham, Chubb v. ----------- 213
Pennis, Stuart v. ------------- 50
Pennsylvania, etc. R. R., Toledo, etc. R. R. v. --------------- 24
Peters, Wheaton v. ----------- 322
Pierce, World's Dispensary Med. Ass'n v. -------------------- 339
Pitt, Langford v. ------------- 120
Pomeroy v. Fullerton ---------- 188
Portland, etc. R. R., Sullivan v. 26
Port Royal Co. v. Hammond --- 20
Potter v. Ellice --------------- 124
Potter v. Whitten ------------- 3
Powell v. Santa Fe R. R. ----- 58
Powers v. Flansburg ---------- 391
Pyatt v. Lyons --------------- 186

Rankin v. Charless ------------ 255
Rector of St. David's v. Wood 53
Reed, Dockstader v. ----------- 81
Regis v. Jaynes & Co. ---------- 335
Reno, C., B. & Q. R. R. v. ---- 23
Rhoten v. Baker -------------- 23
Roberts v. Marchant ----------- 123
Roberts v. Scull -------------- 105
Robinson v. Appleton --------- 91
Routh v. Webster ------------- 343
Royal League v. Kavanaugh --- 16
Rutherford v. Stewart --------- 47
Ryan, Haskins v. ------------- 316

St. Louis Range Co. v. Kline Drummond Co. ------------- 31
Santa Fe R. R., Powell v. ----- 58
Savings Bank Co. v. Parisette -- 150
Sawyer v. Davis -------------- 264
Saxby, Cobb v. --------------- 294
Saxey, Hamilton-Brown Shoe Co. v. ---------------------- 346
Scott v. Magloughlin ---------- 27
Scull, Roberts v. -------------- 105
Shubert v. Woodward --------- 56
Skrainka, Isaacs v. ------------ 203
Slingerland v. Slingerland ----- 165
Smith, Brown v. -------------- 199
Smith, Daly v. --------------- 72
Smith, King v. ---------------- 231
Smith, Wells v. --------------- 190
Snetzer, Snook v. ------------- 19
Snook v. Snetzer -------------- 19
Soltau v. DeHeld ------------- 275
Sprake v. Day ---------------- 127
Stafford, Gartrell v. ----------- 39
Starr v. Woodbury Glass Works 242
State v. Ohio Oil Co. --------- 298
Stein, Gottschalk v. ----------- 46
Stewart, Horse Shoe Club v. -- 400
Stewart, Rutherford v. -------- 47
Stewart, Turner v. ------------ 247
Strohmaier v. Zeppenfeld ------ 162
Stuart, King v. --------------- 237
Stuart v. Pennis -------------- 50
Stump, Gwathney v. ----------- 1
Sturges v. Bridgman ---------- 261
Sullivan v. Portland etc. R. R. -- 26

Tabor v. Hoffman ---------- 331
Taylor v. Adams ---------- 228
Tennessee Copper Co., Georgia v. ---------- 309
Thompson v. Winter ---------- 184
Thurber v. Meves ---------- 218
Toledo etc. R. R. v. Pa. etc. R. R. ---------- 24
Town of Union, Fessler v. ---------- 296
Tracy, Corbin v. ---------- 43
Trotter, Cloyd v. ---------- 9
Tumlinson v. York ---------- 152
Turner v. Stewart ---------- 247
Tuttle v. Buck ---------- 360
Tuxbury, Hoyt v. ---------- 192

Ullsperger v. Meyer ---------- 216
Union Bag & Paper Co., v. Whalen v. ---------- 280
Union Ry. Co., Whitney v. ---------- 117

Virginia R'y Co., Harper v. ---------- 60

Walcott v. Walker ---------- 330
Walker, Giles v. ---------- 259
Walker, Walcott v. ---------- 330
Walsh, Engle v. ---------- 385
Wannamaker v. Brown ---------- 149
Warfield, Ex parte ---------- 381
Warfield-Howell Co. v. Williamson ---------- 4
Warlier v. Williams ---------- 251
Warren v. Parkhurst ---------- 272
Washburn Iron Co., Wesson v. 313
Watts v. Kellar ---------- 220
Webb v. Hughes ---------- 196
Webb, O'Neill v. ---------- 55
Webster v. French ---------- 193
Webster, Routh v. ---------- 343
Weis v. Meyer ---------- 89
Welles, Crabtree v. ---------- 157
Wells, Hartman v. ---------- 93
Wells v. Smith ---------- 160
Wesson v. Washburn Iron Co. - 313
West, Edwards v. ---------- 142
West, Western Wagon Co. v. -- 61
Western Wagon Co. v. West -- 61
Whatman v. Gibson ---------- 91
Whalen v. Union Bag & Paper Co. ---------- 280
Wheaton v. Peters ---------- 322
Whipple v. McIntyre ---------- 257
Whiteside, Guard v. ---------- 65
Whitney v. Union Ry. Co. ---- 117
Whitten, Potter v. ---------- 3
Willey, Hetfield v. ---------- 200
Williams, Warlier v. ---------- 251
Williamson, Warfield Howell Co. v. ---------- 4
Winter, Thompson v. ---------- 184
Wood, Rector of St. David's v. - 53
Wood v. Midgley ---------- 175
Woodbury Glass Works, Starr v. 242
Woodward, Shubert v. ---------- 56
Woolums v. Horsley ---------- 153
World's Dispensary Med. Ass'n v. Pierce ---------- 339
Worster, Great Falls Mfg. Co. v. 12
Wren, Moss & Raley v. ---------- 33

Y. & L. Coal Co., Hawarden v. - 357
York, Tomlinson v. ---------- 152
Young v. Overbaugh ---------- 170

Zeppenfeld, Strohmaier v. ------ 62

# CASES ON EQUITY

## PART 1.

## CHAPTER I. INTRODUCTION

### GWATHNEY v. STUMP.

(Supreme Court of Tennessee, 1814, 2 Tenn. (2 Overton) 308.)

OVERTON, J. . . . The great and important principles of the court of chancery, so necessary to the preservation of law in a free country, were unknown in the time of Coke. The exercise of its necessary powers met with his decided and strenuous opposition. And it will always be kept in mind that the jurisdiction of chancery was then in its infancy. Its superiority to courts of law, in adapting its modes of redress in civil cases, to the varied actions of men was then unknown; nor in fact had any efforts been made to ascertain the limits of its jurisdiction, narrow as it was. We have not a vestige of a decision in chancery previous to the time of Charles II.

It was the court of common law that anciently did all the business and it was in advancement of the jurisdiction and improvement of those courts, that we find the sturdy and capacious mind of Coke employed. Most of his reported cases, and references to other reports respected cases decided at law.

In his time, and particularly with his disposition, if a man could not obtain remedy at law, he must generally go without it. Though there was not wanting a disposition to make the modes of redress at common law, adequate to the exigencies of society; yet so confined were those courts in their method of proceeding, as to be incapable of administering substantial justice in many cases; this generated a disposition in the nation to enlarge the chancery powers, to administer justice where the modes of redress at law were incompetent to afford it. As commerce extended, and civilization progressed, the necessity and convenience of the exercise of chancery powers increased; until

[1] The statement of facts has usually been omitted. Where parts of the opinion have been omitted, such omission has been indicated thus: . . .

we see at this day, a court of equity, exercising undisputed jurisdiction, not only as an auxiliary in the cause of justice, agreeably to its original character; but exercising concurrent jurisdiction with courts of law, in relation to many of its important branches, when the modes of legal redress have been found to be embarrassed, doubtful, or inadequate. . . .

The principles which govern the rights of men are exactly the same in courts of law, and courts of equity. The history of our jurisprudence shows that the latter has ever acted as pilots for courts of law, in the improvement of legal science. Sir John Mitford observes, that "the distinction between strict law and equity is never in any country a permanent distinction. It varies according to the state of property, the improvement of arts, the experience of judges, the refinement of a people"—and again, that "law and equity are in continual progression, and the former is constantly gaining ground upon the latter. A great part of what is now strict law, was formerly considered as equity; and the equitable decisions of this age will unavoidably be ranked under the strict law of the next." Mitf. 428, 431. In this short outline, we see the boundaries between law and equity, described by the pen of a master in his profession. The precedents result in this, that wherever a party can obtain adequate relief in a court of law, according to its modes of proceeding, he shall not have relief in equity. But where the remedy is difficult, embarrassed, or inadequate, equity will entertain jurisdiction. 3 Johns. 590, 2 Cains 251, Hughes Rep. 79, 10 Johns. 587.

But it is of great importance, that the jurisdiction of courts of law and equity, should be kept as distinct as possible. Thus, Sir John Mitford, afterwards, when chancellor of Ireland, observes, in the case of Shannon and Bradstreet, when speaking of the constitution of courts of justice, "It is a most important part of that constitution, that the jurisdiction of the courts of law and equity, should be kept perfectly distinct; nothing contributes more to the due administration of justice. And though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different. And anybody who sees what passes in the courts of justice in Scotland will not lament that this distinction prevails. But Lord Mansfield seems to have considered that it manifested liberality of sentiment, to endeavor to give the courts of law the powers which are vested in courts of equity; that it was the duty of a good judge

*ampliare jurisdictionem.* This, I think, is rather a narrow view of the subject. It is looking at particular cases, rather than at the general principles of administering justice, observing small inconveniences, and overlooking great ones." 1 Sch. and Lefroy 66.

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## POTTER v. WHITTEN.

(Missouri Court of Appeals, 1911, 161 Mo. App. 118, 142 S. W. 453.)

Nixon, P. J. . . . In the case at bar, in the original action the defendant was personally served with process and personally appeared and filed an answer, thus conferring on the court jurisdiction over his person. There is no contention that the circuit court of Jasper county did not have jurisdiction over the class of actions to which this action belongs, and we hold that said circuit court did have jurisdiction of the subject matter of action, whether the action be considered as an action at law, on the promissory note as contended by appellant, or as a suit in equity for the foreclosure of the lien of a pledge as contended by respondent.

Under our code of procedure we have but one form of action for the enforcement or protection of private rights which is called a civil action. We submit all causes to the judgment of one court; and, in order to enable it to fulfill its functions, the law has clothed the judge thereof not only with the attributes of a law judge, but also with those of a chancellor (State ex rel. v. Evans, 176 Mo. 1. c. 317, 75 S. W. 914). Both legal and equitable causes of action may be joined in the same petition if connected with the same transaction. (Blair v. Railroad, 89 Mo. 383, 1 S. W. 350; Woodsworth v. Tanner, 94 Mo. 124, 7 S. W. 104.) The fact that a statutory remedy has been provided does not exclude the original equitable remedy; so that under the decisions of this state ample play is given to the powers of a court of equity, and when it has once acquired jurisdiction for one purpose the general principle is enforced that it will retain jurisdiction for all purposes and do complete justice and not put the parties to the trouble of an action at law. . . .

The wisdom of the law should no longer require a litigant to be driven from one court to another, nor be compelled to have two causes of action and two trials instead of one when the whole matter can be disposed of in one action. . . .

## WARFIELD HOWELL CO. v. WILLIAMSON.

(Supreme Court of Illinois, 1908, 233 Ill. 487, 84 N. E. 706.)

VICKERS, J. . . . Plaintiffs in error seek to maintain the proposition that since the relation of the parties, as well as the relief sought, is purely legal, equity has no jurisdiction. Defendant in error seeks to uphold the jurisdiction of equity, on the ground that the case falls within the exclusive jurisdiction of a court of equity. Neither of these contentions is sound. In our opinion the case belongs to that class where both the primary rights and the relief sought are purely legal and therefore cognizable in a court of law, but of which a court of equity will take jurisdiction on the ground that, owing to the methods of procedure and the means available to carry its decrees into execution, its remedies are more adequate, complete and prompt than those afforded by a court of law. Defendant in error in the case at bar is the holder of six policies of insurance on which it claims a liability against plaintiffs in error on account of the loss of its goods by fire. There is nothing in the character of the rights or in the ultimate relief sought that distinguishes this case from any other claim under an insurance policy for loss. It would be a very unusual state of facts if one holding a fire insurance policy could not maintain an action at law thereon to recover for a loss. We see no reason for holding that the policies involved in this suit might not be sued on in a court of law. It does not follow, however, that because the case is one in which a remedy at law is afforded, equity will not also take jurisdiction of the same state of facts to afford the same redress. If the remedy in equity is more adequate because of some special circumstance of the situation, the jurisdiction of equity will be sustained. In the case at bar the ultimate relief sought is the satisfaction of a legal demand, but this demand is to be paid out of a particular fund created or to be created by contributions made by a large number of persons, which is either in the hands of the manager or is to be collected by him from the subscribers. It may become necessary, before the decree is satisfied, to require the manager to perform some or all of the personal duties which he has assumed in respect to the collection and disbursement of the funds of the indemnity company. If so, the procedure in courts of equity is peculiarly well adapted to enforce the performance of any personal act required of plaintiffs

in error in order to obtain satisfaction of the decree. One of the oldest maxims of equity is that it acts *in personam*—not *in rem*. A decree in chancery speaks in words of command to the defendant, but to carry it into effect some personal act of the defendant is required. For instance, equity determines that one party is the owner of the equitable title to land and decrees that a conveyance shall be made by the holder of the legal title thereof. Such a decree does not, *ex proprio vigore*, vest the title. The personal act of the defendant, or some one for him, in making the conveyance is necessary to carry the decree into effect. (1 Pom. sec. 428, *et seq.*) A court of equity has all the powers of a law court to enforce its decrees by an execution against the property of the defendant. In addition to the usual process of execution against the goods, chattels, lands and tenements of the defendant, a court of equity may, if necessary, attach the defendant and enforce a compliance with its decree by fine or imprisonment,—one of both,—or may direct a sequestration for disobedience to its decree. (Hurd's Stat. 1905, chap. 22, sec. 47.) By the flexibility of its procedure and the score of remedies it is authorized to employ to secure satisfaction of its decrees, courts of equity are peculiarly well equipped to furnish complete and adequate relief in cases of this character. There is a legal obligation at the foundation of the suit, but difficulties may arise out of the manner in which the obligation rests upon the persons or property of plaintiffs in error or in the efficiency of the process belonging to the law court which makes the legal remedy inadequate. (Wylie v. Coxe, 15 How. 416; Barber v. Barber, 21 Id. 582.) In Weymouth v. Boyer, 1 Ves. Jr. 416, Mr. Justice Buller says: "We have the authority of Lord Hardwicke that if a case was doubtful or the remedy at law difficult we would not pronounce against the equity jurisdiction. This same principle has been laid down by Lord Bathurst." (See Society of Shakers v. Watson, 68 Fed. Rep 630.) We have no doubt of the jurisdiction of a court of equity under the facts disclosed here. . . .

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## CAMPBELL v. GILMAN.

(Supreme Court of Illinois, 1861, 26 Ill. 210.)

This was an action of assumpsit, brought by the indorser of a promissory note against the makers.

Declaration in the usual form, with special and common counts.

Plea: That since the commencement of the suit, in a certain cause in said court, in which William Engles, Michael Engles, John Engles, and Joseph Engles by William Engles, his next friend, were complainants, and Peter Engles, Catherine Goetell, Peter Goetell, said defendants, Orris H. Bullen and George C. Campbell, and also Joseph O. Glover, were defendants, the said Campbell and Bullen were enjoined from paying said note until the further order of said court, and that said order was in full force and effect.

Demurrer to plea, general and special. . . .

Breese, J. . . . The demurrer was properly sustained to the plea in this case. No case can be found in the books, where a temporary injunction, like that set out in the plea, was ever held to be a bar to the recovery of a judgment in an action upon a note. It acts only upon the defendant's name in the writ, and would operate to prevent payment, but not on the action of the court to render a judgment. By proceeding, the plaintiff might, possibly, subject himself to a contempt, but the court might proceed with the cause. If such an injunction could be pleaded in bar, it would amount to a complete satisfaction of the debt, as much so as actual payment.

The appellants were called upon to produce authority for such a plea, but none is shown. . . .

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## EATON v. McCALL.

(Supreme Court of Maine, 1894, 86 Maine, 346, 29 Atl. 1103.)

Wiswell, J. Bill in equity between parties resident in this State to foreclose a mortgage upon real estate situated in Nova Scotia.

The defendant failing to appear, the bill was taken *pro confesso.* Afterwards on motion for a decree, the justice presiding at *nisi prius*, being doubtful as to the jurisdiction of this court, with the consent of counsel for the complainant reported the case to the law court to determine whether the bill should be sustained, and what decree if any, should be made.

It is a familiar maxim of equity jurisprudence, that equity acts against the person. Where the subject-matter is situated within another State or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which

*directly* affects and operates upon the person of the defendant and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts toward it, and it is thus ultimately but *indirectly*, affected by the relief granted. Pomeroy's Equity Jurisprudence, § 1318.

Common instances of such an exercise of equity powers, are where courts, having jurisdiction of the person, decree the specific performance of contracts to convey lands, enforce and regulate trusts, or relief from fraud, actual or constructive, although the subject matter of the contract, trust or fraud, either real or personal property be situated in another State or country. A leading case upon this subject and one often cited in modern cases, is that of Penn v. Lord Baltimore, 1 Ves. 444, decided in 1750 by Lord Chancellor Hardwicke.

The fact of the *situs* of the land being without the commonwealth does not exempt defendant from jurisdiction, the subject of the suit, being the contract, and a court of equity dealing with persons, and compelling them to execute its decrees and transfer property within their control, whatever may be the *situs*. Pingree v. Coffin, 12 Gray, 288.

The principle is thus stated by the Federal Supreme Court: "Where the necessary parties are before a court of equity, it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitae,* which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts do consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by a process *in personam*." Phelps v. McDonald, 99 U. S. 298.

Our court in Reed v. Reed, 75 Maine, 264, sustained a bill and made the necessary decrees to redeem from a mortgage lands situated in the state of Wisconsin. And the court has in many cases proceeded and granted relief upon the maxim, *equitas agit in personam.*

The English chancery courts, regarding the right to redeem as a mere personal right, and the decree for a foreclosure, a decree *in personam,* have often decreed the foreclosure of mortgages upon lands beyond the jurisdiction of the court. Toller v. Carteret, 2 Vern. 495; Paget v. Ede, L. R. 18 Eq. 118.

In this country the question has frequently arisen as to the power of an equity court to decree the foreclosure of a mortgage upon property situated both within and without the jurisdiction of the court. The doctrine is sustained by the highest authorities that a court having jurisdiction of the person of the mortgagor, or of the owner of the right to redeem, may decree such a foreclosure.

In Muller v. Dows, 4 Otto, 444, it was held that a U. S. Circuit Court for the District of Iowa, which had jurisdiction of the mortgagor and the trustees of the mortgage, could make a decree foreclosing a mortgage upon a railroad and its franchises and order a sale of the entire property although a portion of the property was in the State of Missouri. Mr. Justice Strong in delivering the opinion of the court said, "Without reference to the English Chancery decisions, where this objection to the decree would be quite untenable, we think the power of courts of chancery in this country is sufficient to authorize such a decree as was here made. It is here undoubtedly a recognized doctrine that a court of equity sitting in a State and having jurisdiction of the person may decree a conveyance by him of land in another State, and it may enforce the decree by a process against the defendant.

In Union Trust Co. v. Olmstead, 102 N. Y. 729, the plaintiff sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation upon property, a part of which was situated in another State. The court held that although the decree of foreclosure might not be operative beyond the territorial limits of the jurisdiction, that the court might have required the mortgagor, being within the jurisdiction, to execute a conveyance of the property situated in the other State.

To the same effect are numerous other decisions by courts of the highest authority in this country, both Federal and State. After an examination of these authorities we have no doubt that this court has the power to make a decree compelling a mortgagor, over whom it has jurisdiction, to make a conveyance of the mortgaged premises, after failure to pay the amount ascertained to be due, within the time fixed by a decree of the court, which time should not be less than the statutory period allowed for redemption in the place where the land is situated.

But as to when and under what circumstances this power should be exercised by the court, is, we think, another and quite different question. It must be remembered that no decree of the court would be operative except one against the mortgagor, or person having the right to redeem, commanding a conveyance. The court could not proceed in the usual and customary method by decreeing either a strict foreclosure or a foreclosure by a judicial sale. Neither the decree itself nor any conveyance under it, except by the person in whom the title is vested, can operate beyond the jurisdiction of the court. Watkins v. Holman, 16 Pet. 25. A court cannot send its process into another State nor can it deliver possession of land in another jurisdiction. *Muller v. Dows, supra.* It can only accomplish foreclosure of such a mortgage by its decree *in personam,* compelling a conveyance.

We do not think that a chancery court should exercise this power except under unusual or extraordinary circumstances. Wherever it is necessary in order to prevent loss or to protect the rights of a mortgagee it may be done, for instance in the case of a mortgage upon property situated both within and without the State, where unless a sale of the entire property could be made at one time, great loss might ensue, or in other cases where an equally good reason existed. But ordinarily we think that the holder of a mortgage should be required to resort to the remedies or the courts of the jurisdiction in which the land is situated. This is in accordance with the principle, than which none is better established that the disposition of real estate, whether by deed, descent, or by any other mode, must be governed by the law of the state where the same is situated. *Watkins v. Holman, supra.*

In this case there are no reasons, either alleged or apparent why the holder of the mortgage cannot foreclose the same according to the law of the place where the land is situated, without loss or great inconvenience.

We think therefore that the entry should be,

Bill dismissed without prejudice.

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## CLOYD v. TROTTER.

(Supreme Court of Illinois, 1887, 118 Ill. 391.)

SCOTT, C. J. The bill in this case was brought in the circuit court of Wayne county, by William Trotter, against James C. Cloyd, and

was to remove a cloud from the title to property which complainant claimed to own. A decree was rendered in accordance with the prayer of the bill, and as the title to the property is involved, defendant brings the case directly to this court on error, as he is authorized by law to do.

No question is raised on the bill, and the assignment of errors does not make any discussion of the merits of the case necessary. Defendant is a non-resident of the State of Illinois, and the service upon him was by a service of a copy of the bill upon him, at his residence in the city of New York. It is objected, the service was insufficient, and as there was no appearance by defendant, or by any solicitor for him, the court had no jurisdiction to render the decree it did. Section 14 of the Chancery Act (Rev. Stat. 1874, p. 200) provides: "The complainant may cause a copy of the bill, together with a notice of the commencement of the suit, to be delivered to any defendant residing or being without this State, not less than thirty days previous to the commencement of the term at which such defendant is required to appear, which service, when proved to the satisfaction of the court, shall be as effectual as if such service had been made in the usual form within the limits of this State."

The point is made against the sufficiency of the service in this case, that the notice of the commencement of the suit was not signed, either by complainant, or any solicitor for him. The Statute does not, in terms, require the notice to be served shall be signed either by complainant or his solicitor, but the better practice, no doubt, is, that it should be signed. In this case the notice was attached to the bill, and may be treated as a part of it, and as the bill was signed by the solicitor of complainant, that is thought to be sufficient, and especially when considered in connection with the affidavit of the party making the service, wherein it is alleged he "served a copy of the within bill and notice of the commencement of the suit, upon" defendant. In this respect the notice is sufficient.

It is further objected, no summons was issued for defendant, and no effort made to obtain personal service upon him. Here, again, the statute is silent. It is not provided summons shall be issued and returned not found, before a defendant residing or being without the limits of this State may be served with a copy of the bill filed against him, and of a notice of the commencement of the suit. But if the statute did require the issuing and return of a summons, it is thought this record does show a summons was issued, and returned not found,

as to defendant, before the copy of the bill was served upon him. The question of jurisdiction is always a preliminary one, and the court, in this case, found, by its decree, it appeared "to the court a summons had been issued against defendant and returned not found." There is nothing in the record itself that contradicts this finding of the court, and it must therefore be regarded as having been correctly found. No summons is found in the record for defendant. The clerk recited that the only summons found among the papers of the case, is one for J. B. Cornell, at the suit of William Trotter. Cornell is not a party to this suit in any way. There is nothing whatever to show the summons transcribed into the record was issued in this case, or that it was before the court when it found, as it did, that "a summons had been issued against defendant, and returned not found." It may be that a summons for defendant was issued, and lost from the files. How that may be, of course does not appear, but it is certain there is nothing to show the court found incorrectly on this jurisdictional question.

The third error of the series, viz., the court erred in entering a personal judgment against defendant for costs, and in awarding execution against him for the collection of the same, seems to be well assigned. There was no appearance in the court below, either by defendant, or any solicitor for him, and it is not perceived how that court obtained jurisdiction of his person so as to render a personal decree against him, for costs or otherwise, and to award execution against him, as for the collection of a personal money decree. So far as the property situated within the jurisdiction of the court is involved, the court had jurisdiction to decree concerning it, and defendant, and all parties claiming through or under him, would be bound. But that fact gave no jurisdiction to the court to render a personal money decree against him, as the court might do if defendant had been within its jurisdiction. It affirmatively appears in this case, defendant resided in another State. Treating the service by copy of the bill, and notice of the commencement of the suit, as effectual "as if such service had been made in the usual form within the limits of this State," as the Statute provides shall be done, still such service does not confer jurisdiction on the court, of the person of defendant, so as to enable it to render a personal money decree against him, to be collected by execution. No one will insist the court could send its process out of the State, and by proof of service within a foreign State acquire juris-

diction over the person of defendant, so as to render a personal money decree against him. It is so obvious it need not be stated, that persons residing or being without the limits of this State can not be subjected to the jurisdiction of the local courts by the service of process or other service upon them at the place of their domicile.

The decree of the circuit court, so far as it adjudged costs against defendant, and awarded execution for the collection of the same, will be reversed in this court, but in all other respects it will be affirmed; and as he ought, on account of the wrongful conduct alleged against him in the bill, to pay such costs, plaintiff in error will be required to pay all costs in this case in this court.

Decree reversed in part and in part affirmed.

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## GREAT FALLS MANUFACTURING COMPANY v. WORSTER.

(Supreme Court of New Hampshire, 1851, 23 N. H. 462.)

In Equity. The following case was stated in the bill:

The orators are a corporation established at Great Falls, on Salmon river, in Somersworth, and own five cotton mills there, with suitable machinery, and to enable them to use the mills, they need the water of Salmon river. For this purpose, they have kept up a dam for some years past, across the river, at the outlet of the Three Ponds, so called, partly in Milton, in this county, and partly in Lebanon in the State of Maine, and have thereby accumulated the water in rainy seasons, and have used it in seasons of drought. The respondent, who is a citizen of New Hampshire, claims an interest in certain tracts of land, some of which are in Milton, and some are in Lebanon, and which are flowed by the water of the pond created by the dam, his rights to which lands are denied by the orators. The respondent has recently destroyed a part of the dam, and threatens to remove the whole of it, so that it shall be no higher than, as he alleges, it ought to be, and so that it shall not cause the water to flow the lands in which he professes to have an interest. The bill prays, that he may be enjoined from destroying any part of the abutment, dam, or superstructure, and from intermeddling with it in any way.

The bill contained other allegations, which are at present immaterial, the only question now raised, being, whether the court had jurisdiction

to restrain a citizen of this State, from going into another State, and committing acts injurious to the property of the orators situated here. . . .

Gilchrist, C. J. The application now before us is made by virtue of the provision contained in No. 7, ch. 171, Rev. Stat., which authorizes the court to "grant writs of injunction whenever the same shall be necessary to prevent injustice." Questions analogous to that now presented have often been investigated, both in England and in this country, and the principles recognized by the decisions, go far enough to authorize the court to grant the relief now prayed for. The court are not asked to assume any jurisdiction, or exercise any control over the land in Maine, or to interfere with the laws of that State. Nothing more is asked than that the respondent, a citizen of New Hampshire, and residing within her limits, shall be subject to her laws, and that, being within reach of the process of this court, he shall be forbidden to go elsewhere and commit an injury to the property of other citizens, situated here, and entitled to the protection of our laws.

In the case of Penn v. Lord Baltimore, 1 Ves., 444, Lord Hardwicke recognized and acted upon the principle that equity, as it acts primarily *in personam,* and not merely *in rem,* may make a decree, where the person against whom relief is sought, is within the jurisdiction upon the ground of a contract, or any equity subsisting between the parties respecting property situated out of the jurisdiction. A decree was made for the specific performance of a contract relating to the boundary between the colonies of Pennsylvania, and Maryland. In the course of his judgment, Lord Hardwicke says: "this court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries, and their bill does not stand in need of that. It is founded on articles executed in England, under seal, for mutual considerations, which gives jurisdiction to the king's courts, both in law and in equity, whatever be the subject-matter." He subsequently says: "the conscience of the party was bound by this agreement, and being within the jurisdiction of this court, which acts *in personam,* the court may properly decree it as an agreement."

This case decided, that although the subject-matter of a contract be land out of the jurisdiction, the boundary of the land may be settled by a degree for a specific performance of the contract. In this way a party within the jurisdiction may be compelled to do an act of justice,

in relation to land out of the jurisdiction. The case is a leading one, and its principle has been extensively followed. This doctrine, however, was not first suggested by Lord Hardwicke. Before his time, it was well established in the court of chancery, although it had not received so elaborate an exposition in any preceding case, as in the decision referred to. In the case of Arglasse v. Muschamp, 1 Vernon, 75, the bill prayed for relief against an annuity charged upon the orator's lands in Ireland, on the ground of fraud. The respondent pleaded to the jurisdiction of the court, that, the lands lying in Ireland, the matter was properly examinable there, and that the court ought not to interpose. The Lord Chancellor said: "this is surely a jest put upon the jurisdiction of this court, by the common lawyers; for when you go about to bind the lands, and grant a sequestration, to execute a decree, then they readily tell you, that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam,* only; and when, as in this case you prosecute the person for a fraud, they tell you, you must not intermeddle here, because the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local; and so would wholly elude the jurisdiction of this court." The plea was overruled. In the case of Toller v. Carteret, 2 Vernon, 494, the bill was to foreclose a mortgage upon the island of Sarke, and the respondent pleaded to the jurisdiction of the court, that the island of Sarke was part of the Duchy of Normandy, and had laws of its own, and was under the jurisdiction of the courts of Guernsey, and not within the jurisdiction of the court of chancery. But it was held, "that the court of chancery had also a jurisdiction, the defendant being served with the process here, *et aequitas agit in personam,* which, is another answer to the objection." In Lord Cranstown v. Johnson, 3 Ves., 170, the master of the rolls, after commenting on some of the cases, says: "these cases clearly show, that with regard to any contract made, or equity between persons in this country, respecting lands in a foreign country particularly in the British dominions, this court will hold the same jurisdiction, as if they were situated in England." In Portarlington v. Soulby, 3M & R. 104, the bill was to restrain the respondents from suing in Ireland, upon a bill of exchange given for a gambling debt. Upon a motion to dissolve the injunction Lord Brougham said: "In truth nothing can be more unfounded, than the doubts of the jurisdiction. That is grounded, like all

other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made, being within the power of the court. If the court can command him to bring home goods from abroad, or to assign chattel interests, or to convey real property locally situate abroad; if for instance as in Penn v. Lord Baltimore, it can decree the performance of an agreement touching the boundary of a province in North America; or as in the case of Toller v. Carteret, can foreclose a mortgage, in the isle of Sarke, one of the channel islands, in precisely the like manner can it restrain the party, being within the limits of its jurisdiction, from doing anything abroad, whether the thing forbidden be a conveyance, or other act *in pais*, of the instituting or prosecution of an action in a foreign court."

The principle that a court in chancery will exercise such a power as the orators ask should now be enforced, whenever the case is one of equitable cognizance, and the parties are within the jurisdiction, although the property may be beyond it, is as fully recognized by the courts in this country, as in England. In Massie v. Watts, 6 Cranch, 148, the question was whether the defendant, being within the jurisdiction of the circuit court in Kentucky, could be decreed to convey lands in Ohio, and the defence was that the land lay beyond the jurisdiction of the court. Marshall, C. J., said, "where the defendant is liable, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practiced upon the plaintiff, the principles of equity give a court jurisdiction, wherever the person may be found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction. . . .

In the case of Sutphen v. Fowler, 9 Paige, the bill was filed for the specific performance of a contract for the sale of lands in Michigan, against the infant child of the contracting party, who at the time of his death was entitled to a conveyance of the legal title to the premises, which was subsequently made to the defendant. It was held, that the court had jurisdiction to decree the specific performance of a contract for the sale of lands in another State, where the person of the defendant was within reach of its process, and might direct a conveyance by the infant when she should arrive at the proper age

to enable her to transfer the legal title according to the laws of Michigan and might authorize the orator to take and to retain possession of the premises until that time, if he could obtain possession of them without suit. It was also held, and that is very pertinent to the present inquiry, that in the meantime, the court might grant a perpetual injunction, restraining the defendant from disturbing the complainant in such possession, or from doing any act whereby the title should be transferred to any other person, or in any way impaired or incumbered.

This decision is in point not only as regards the principle, but also in relation to its application to a state of facts similar to those in the case now before us. Nothing more is asked by the orators here, than that the defendant should be restrained from injuring or interfering with the property of the orators situated in Maine, and the above case of Sutphen v. Fowler is an express adjudication that he may be so enjoined. The principle is also recognized and stated, by the most eminent elementary writers. Jeremy's Eq. Jur., 557; Story's Eq. Jur., 743, 744, 899, 900.

It would be a great defect in the administration of the law, if the mere fact, that the property was out of the State could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this State, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding, that the court has jurisdiction to issue the injunction prayed for.

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## ROYAL LEAGUE v. KAVANAGH.

(Supreme Court of Illinois, 1908, 233 Ill. 175, 84 N. E. 178.)

Dunn, J. The appellant filed its bill in the circuit court of Cook county for an injunction to restrain the appellee from bringing an action in the State of Missouri against the appellant upon a benefit

certificate issued by it to Thomas W. Kavanagh, in which the appellee was named as beneficiary. The circuit court sustained a demurrer to the bill, which was thereupon dismissed for want of equity, and that decree having been affirmed by the Appellate Court, this further appeal is prosecuted by the appellant. . . .

The bill further alleged that the appellee, in order to evade the law of Illinois by which her rights should be determined and in order to avail herself of the law of Missouri, now threatens to bring legal proceedings in Missouri on the benefit certificate to compel the appellant to pay the sum of $4,000 whereas in truth and in fact it is liable for no more than $322.84, which action and conduct on the part of the appellee, unless restrained, will be a fraud upon the appellant and will result in depriving it of its rights under the laws of this State. . . .

There is no question as to the right to restrain a person over whom the court has jurisdiction from bringing a suit in a foreign State. (Harris v. Pullman, 84 Ill. 20). The courts do not, in such cases, pretend to direct or control the foreign court, but the decree acts solely upon the party. The jurisdiction rests upon the authority vested in courts of equity over persons, within the limits of their jurisdiction and amenable to process, to stay acts contrary to equity and good conscience. The State has power to compel its own citizens to respect its laws even beyond its own territorial limits, and the power of the courts is undoubted to restrain one citizen from prosecuting in the courts of a foreign State an action against another which will result in a fraud or gross wrong or oppression. (Snook v. Snetzer, 25 Ohio St. 516; Keyser v. Rice, 47 Md. 203; Teager v. Landsley, 69 Iowa, 725; Wilson v. Joseph, 107 Ind. 490; Dehon v. Foster, 4 Allen, 545). But the court will not restrain the prosecution of a suit in a foreign jurisdiction unless a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice. It is not enough that there may be reason to anticipate a difference of opinion between the two courts, and that the courts of the foreign State would arrive at a judgment different from the decisions of the courts in the State of the residence of the parties. (Carson v. Durham 149 Mass. 52). It is not inequitable for a party to prosecute a legal demand against another in any forum that will take legal jurisdiction of the case, merely because that forum will afford him a better remedy

than that of his domicile. To justify equitable interposition it must be made to appear that an equitable right will otherwise be denied the party seeking relief. Thorndike v. Thorndike, 142 Ill. 450.

A person has the right to select such tribunal having jurisdiction as he chooses for the prosecution of his rights, and the court which first obtains jurisdiction will retain it. Such jurisdiction cannot be defeated because the defendant may prefer another tribunal in which he supposes the decision will be more favorable to him. In this case it is not averred that the Supreme Court of Missouri has laid down any rule of law different from that of this court. The averment is, that in two cases mentioned the Court of Appeals of Missouri has settled the rule of law in that State in accordance with the statement thereof in the bill. It is not averred that the Court of Appeals of Missouri is the court of final appellate jurisdiction in the State, or that the court of final appellate jurisdiction has made any decision of any question involved in this case. While the law of another State is matter of fact of which we cannot take judicial notice, yet the allegations of the bill in that regard are entirely consistent with the hypothesis that the Court of Appeals, whose decisions are alleged to have established the law of Missouri, may be an inferior court of that State of limited territorial jurisdiction, whose decisions are subject to review by the Supreme Court. This court cannot, in advance of its announcement by the Supreme Court of Missouri, assume that the common law in that State will be declared to be different from the common law as construed in this State. Allegation and proof that a court of a State not having final appellate jurisdiction has settled a particular rule of law does not constitute allegation or proof that such rule is the law of the State. So far as appears, if the appellee should bring an action in the State of Missouri against appellant on this benefit certificate, and if the *nisi prius* and Appellate Courts should decide against appellant, it would be entitled to have such decision reviewed by the Supreme Court of the State of Missouri, and we have no reason to suppose that that court will not do justice between the parties and give effect to the rules of law applicable to the case.

The judgment of the Appellate Court will be affirmed.

## SNOOK et al. v. SNETZER.

(Supreme Court of Ohio, 1874, 25 Ohio St. 516.)

Rex, J. The assignments of error and the arguments in the case present two questions for the determination of this court.

The first question relates to the exemption laws of this state, and makes the point, whether, by the laws in force when the debt in question was contracted, June 2, 1866, the earnings of the debtor for his personal services within the three months next preceding when necessary for the use and support of his family, were exempt from being applied to the payment of his debts. The policy of this state, as exhibited by its legislation for more than a quarter of a century, had been to protect the family of a debtor, in some measure, from the consequences of debts contracted by its head. . . . Construing the provisions of the code in accordance with well-established rules on that subject, we have no doubt that by these provisions it was intended to exempt, as well in attachment as under the proceedings in aid of execution, the earnings of the debtor for his personal services for the time prescribed, where the same were necessary for the purpose named.

The remaining question to be determined is: Have the courts of this state authority, upon the petition of a resident who is the head of a family, by injunction, to restrain a citizen of the county in which the action is commenced from proceeding in another state to attach the earnings of such head of a family with a view to evade the exemption laws of this state, and to prevent such head of a family from availing himself of the benefit of such laws?

The authority of the courts in such a case to restrain a citizen from thus proceeding for the purpose named, is, in our opinion, clear and indisputable.

In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another state or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and is in the power of the court issuing it. The order operates upon the person of the party, and directs him to proceed no further in the action, and not upon the court of the foreign state or country in which the action is pending. On this subject, Mr. Justice Story, in his Commentaries on Equity Jurisprudence, section 899, says: "Although the courts of one country

have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them, by injunction, to proceed no further in such suit." In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees *in personam*.

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## THE PORT ROYAL RAILROAD COMPANY v. HAMMOND.

(Supreme Court of Georgia, 1877, 58 Ga. 523.)

WARNER, C. J. The defendant is a Georgia corporation, created by an act of the general assembly of this state, and its powers and duties are to be exercised and performed within the territorial limits of the state. As an artificial person, it has no extra-territorial existence—14 Ga. Rep., 328. The object and prayer of the complainant's bill is, that the defendant may be decreed to specifically execute the contract, alleged to have been made with the defendant, for the right of way for its railroad through the lands of the complainant, situated and being in the state of South Carolina, and to recover damages for the injury already sustained from the non-performance of that contract. The complainant's equity is based upon his alleged right to have the defendant compelled, by a decree of the court of this state, to specifically perform the alleged contract in the state of South Carolina, by keeping the ditches open upon the complainant's land, situated in that state, to the depth of five feet, and to construct, and keep in proper repair, sufficient cattle-guards or stock-gaps, upon the complainant's land, in the state of South Carolina. There is no doubt that when a court of equity has jurisdiction of the person of a defendant, it may decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, and also restrain a defendant by injunction in certain specified cases, by acting

upon the *person* of the defendant within its jurisdiction; and that is the principle which the complainant insists should be applied to the defendant in this case. Although a court of equity will act upon the person of a defendant within its jurisdiction, and compel the specific execution of a contract in relation to lands in a foreign state, on a proper case being made, still, we are not aware that the court has ever gone to the extent of compelling a defendant by its decree, to go into a foreign state and specifically execute a contract *there,* even in the case of a natural person; and, more especially, when the defendant is an artificial person, having no legal existence beyond the territorial limits of the state which created it.

The court of equity of Richmond county, in this state, had no jurisdiction to compel the defendant, by its decree, to go into the state of South Carolina and specifically execute the alleged contract, as set forth in complainant's bill, by opening the ditches on complainant's land there, and keeping the same open to the depth of five feet, and by constructing and keeping in repair proper and sufficient cattle-guards, or stock-gaps thereon, and, upon its failure to do so, to enforce that decree by an attachment and sequestration of its property in this state.

If the acts required to be done on the part of the defendant, by the decree of the court, in the specific execution of the contract in question, were required to be performed in this state, there would not seem to be any well-founded objection to the jurisdiction of the court, notwithstanding the land, the subject matter of the contract, is situated in the state of South Carolina. This, however, is as far as the principle contended for has been recognized. See Wharton on Conflict of Laws, sections 288, 289, 290. But the specific execution of the contract, as prayed for in complainant's bill, can only be performed by going on the land in South Carolina and cutting ditches upon it there to the depth to five feet, and keeping them open so as to effect the stipulated drainage of the land, and by constructing and keeping in repair proper and sufficient stock-gaps thereon. To hold that the court has jurisdiction to grant the specific relief prayed for against the defendant, would be to decide that a corporation, an artificial person, having no legal existence beyond the territorial limits of the state which created it, can be compelled to go into another state in which it has no legal existence, and there to cut and keep open ditches, construct and keep in repair

stock-gaps on the complainant's land in that state, and, upon its failure to do so, that its property, in this state, may be attached and sequestered to compel the performance of such specific acts by the defendant in a state and country where it has no legal existence to perform the same. . . . It would, therefore, seem to be much more equitable and just that the complainant should seek a specific execution of the alleged contract against the corporation with which it was made, and in the courts of the state in which the land is situated, and obtain his decree in accordance with the laws of that state, and where the court will have no jurisdiction to enforce it in conformity therewith. The specific execution of contracts by a court of equity must always rest in the sound discretion of the court. To compel the Georgia corporation, by a decree of the court, to specifically perform the alleged contract, made by the complainant with the South Carolina corporation, and to enforce its performance in the latter state by an attachment and sequestration of its property situated in Georgia, would be unfair, unjust, and against good conscience, inasmuch as its property in this state may not be more than sufficient to discharge its own contracts and liabilities to its creditors here.

In our judgment the court erred in overruling the defendant's demurrer to the complainant's bill.

Let the judgment of the court below be reversed.

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## BABCOCK v. McCAMANT.

(Supreme Court of Illinois, 1870, 53 Ill. 215.)

WALKER, J. . . . It has long been the practice, in equity, to enjoin the collection of a judgment that has been paid, satisfied, or it has otherwise become inequitable to enforce; and our statute has recognized the right to enjoin judgments. But it is urged that the remedy was complete under the statute, by applying to the circuit judge at chambers, to order a stay of proceedings under the execution, until a motion to quash the execution and levy could be heard at the next term. This may be true of the execution, and a levy, but it is not clear that the circuit court could correct the judgment on a motion. But even if it could, it is more satisfactory and complete to grant the relief in equity. The facts alleged and admitted by the demurrer, show

gross fraud, and fraud is a matter of equity jurisdiction, and that court did not lose it by the statute conferring similar jurisdiction upon the courts of law. If, then, under the statute, or the inherent power of a court of law to control its process and records, that court could correct the judgment, still it would not deprive equity of jurisdiction. . . .

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## RHOTEN v. BAKER.

(Appellate Court of Illinois, 1902, 104 Ill. App. 653.)

WRIGHT, P. J. This was a bill in equity filed by the plaintiff in error against the defendants in error to require the latter to accept the damages and pay the benefits assessed by a jury for the laying out and opening of a road for private and public use, under the provisions of section 54 of the act in regard to roads and bridges under township organization, and to prevent the defendants from combining and confederating together to defeat the opening of such road. The court sustained a demurrer to the bill and dismissed it for want of equity, and to reverse the decree this writ of error is prosecuted. . . In these conditions plaintiff claims no adequate remedy exists at law, and that he is without such remedy save in a court of equity.

It is, however, insisted by the defendants that inasmuch as the statute gives to the verdict of the jury in such cases the force and effect of a judgment, which it does, that plaintiff's remedy is at law; desiring it to be inferred, we presume, that an execution might be issued upon the judgment for the damages assessed. . . . Plaintiff, therefore, by the facts stated in his bill, admitted by the demurrer, had a right to the road in question, and by the same facts defendants wrongfully obstructed such rights in such manner as the law could afford no adequate remedy for the wrong done by the defendants. If we are right in this conclusion, and we feel sure of that, then no authority need be cited to prove that a bill in equity is the appropriate remedy; for when a right is given to a person, then wrongfully taken away by another, and the law by reason of its universality can not afford a remedy in the peculiar circumstances of the case, equity will correct the law and furnish the remedy. . . .

Reversed and remanded.

## TOLEDO, A. A. & N. M. RY. CO. v. PENNSYLVANIA CO. et al.

(U. S. Circuit Court, 1893, 54 Federal Reporter 746.)

RICKS, J. . . . It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: "I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." Mr. Justice Blatchford, speaking for the supreme court in Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. Rep. 243, said: " . . . It is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation."

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## MORRIS v. PARRY.

(Missouri Court of Appeals, 1904, 110 Mo. App. 675, 85 S. W. 620.)

JOHNSON, J. . . . The relief granted by the court under this strange petition is contained in the following portion of the decree, "that the testimony of John H. Winkle incorporated in the disposition of said John H. Winkle on file in the office of the clerk of the circuit court of Barton county in the case of R. E. Smith against Joseph C. Parry and Nancy C. Parry, defendants, be and the same is hereby established and perpetuated as and for the testimony of the said John H. Winkle for the purpose of establishing the existence of said deed of

said Joseph C. Parry and Josephine Parry to Barton county . . . and in all suits by Nancy C. Parry having for the purpose the establishment of a right of dower in her as the widow of Joseph C. Parry in and to said real estate against all persons whomsoever the same is hereby decreed to be competent testimony." A certified copy of the decree was ordered to be filed and recorded in the office of the recorder of deeds.

This proceeding does not fall within the purview of statutory law—Revised Statutes, sections 4525-4542 and 4565-4571—nor is the remedy sought one known to equity jurisprudence. Every remedy, legal or equitable, having for its object the perpetuation of testimony, is confined to the testimony of witnesses in being. . . .

Respondent, freely conceding that no precedent exists in support of his novel claim, invokes the aid of the general power inherent in equity to provide a remedy where one is lacking for the protection of a right under the maxim, "equity will not suffer a right to be without a remedy." It is true, as urged: "every just order or rule known to equity courts was born of some emergency to meet some new condition and was, therefore, in its time without precedent," and "the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasingly complex business relations and the protection of rights can demand." But however far-reaching and puissant the arm of equity may be, it has its sphere of operation to which it is confined. It supplements and aids the law, does not invade its domain and never works for the destruction of legal right nor in opposition thereto. "Equity will not give a remedy in direct contravention of a positive rule of law." (Bispham's Princ. of Eq., sec. 37; Story's Eq. Juris., sec. 12.)

What is the real aim and object of this proceeding? Stripped of verbal embellishments and reduced to naked fact, it is an attempt to force the admission of incompetent testimony at the trial of the dower suit. That the evidence is incompetent is confessed and urged as a ground for equitable relief. If competent, there is abundant authority in this State justifying its admission without the aid of equity. . . . The decree in this case presents the anomaly of a court sitting as a chancellor making an order upon himself as trial judge to admit as evidence in an action pending before him in the latter capacity the deposition of a deceased witness taken in another cause clearly incom-

petent under elementary principles of law, for this is all the decree amounts to. . . .

The testimony of the witness, now deceased, taken in the form of a deposition over ten years ago in the suit of Smith against the defendant herein and her husband, is incompetent as evidence in the pending dower suit brought by defendant against plaintiff, for the reason that it is hearsay. It is true, the question of title involved in the pending cause is the same as in Smith against this defendant, but the parties are different and there is no privity between the plaintiff in the last-mentioned action and the defendant in the one pending. The land involved in the two suits is different. . . .

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## SULLIVAN v. PORTLAND, ETC., R. R. CO.

(Supreme Court of the United States, 1876, 94 U. S. 806.)

SWAYNE, J. . . . To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive, and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the Statute of Limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly. Wilson v. Anthony, 19 Barber (Ark.), 16; Taylor v. Adams, 14, id. 62; Johnson v. Johnson, 5 Ala. 90; Ferson v. Sanger, 2 Ware, 256; Fisher v. Boody, 1 Curtis, 219; Cholmondly v. Clinton, 2 Jac. & Walk. 141; 2 Story's Eq., sect. 1520a.

"A court of equity, which is never active in giving relief against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect

are always discountenanced; and, therefore, from the beginning of this jurisdiction there was always a limitation to suits in this court." Smith v. Clay, Ambler, 645. . . .

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## SCOTT v. MAGLOUGHLIN.

(Supreme Court of Illinois, 1890, 133 Ill. 33, 24 N. E. 1030.)

SHOPE, C. J. A bill in equity was filed by appellants to foreclose a trust deed dated February 2, 1885, executed by John Magloughlin and wife to John W. Scott, as trustee, to secure the payment of a promissory note of the same date, for $1000, payable in one year, and made by said John Magloughlin payable to his order, and indorsed by him in blank. The note is claimed by appellants to have been executed for an indebtedness due and owing from Magloughlin to Robert Blair, and to have been delivered to said Robert or to William T. Blair. The blank indorsement had, at the hearing, been filled up by writing over the name of Magloughlin the words, "pay to order of Albert B. Clark." . . .

The defenses set up were, in substance, that there was no consideration for the note, and that the note and trust deed were executed at the suggestion and instance of William T. Blair to cover up the equitable title of Robert Blair in the premises thereby conveyed, for the purpose of defeating the claim for alimony of the wife of said Robert, in a pending proceeding for divorce against him. . . .

Appellants come into a court of equity and ask that the equitable rights of Clark be enforced by a foreclosure of the trust deed. In that proceeding the note is a mere incident to the relief sought, while the trust deed is the foundation of the right to relief in equity. The uniform holding in this State, is that a mortgage is a mere chose in action, and when the powers of a court of equity are called into activity to enforce it, relief will be denied if there are equitable reasons why its power should be withheld, or if, in equity and good conscience, the relief asked should be granted. It may be conceded that if Clark was an assignee for value before maturity of the note (which he was not), he would, under the statute respecting negotiable instruments, be protected against these defenses in a suit upon the note; yet, the trust deed not being negotiable, the right resting in him would be an equitable

right only, and he would take it subject to the legal and equitable defenses to which it was liable before it came to his hands. There are some exceptions to the rule, perhaps; but upon examination it will be found that the right of Clark falls within none of them. A court of equity, when its power is invoked, will not deprive a party, unless controlled by some inflexible rule of law, of such defenses, either legal or equitable, as are intrinsically just in themselves, or permit the complainant to recover contrary to the principles of equity. Olds v. Cummings et al., 31 Ill. 188; Sumner et al. v. Waugh et al., 56 id. 538; Walker v. Dement, 42 id. 280; Thompson v. Shoemaker, 68 id. 256; Bryant v. Vix, 83 id. 14. . . .

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## HERCY v. BIRCH.

(High Court of Chancery, 1804, 9 Vesey 357.)

By Indentures, dated the 1st of June, 1787, between Lovelace Hercy, Thomas Birch, and Abraham Henry Chambers, reciting, that they had on the 25th of March last commenced co-partners in the business of a banker, it was agreed, that they should continue to carry on the said business for the term of ten years; and that in case any or either of them should after the expiration of that partnership continue to carry on the business of a banker, either alone or in partnership with any other person, until any one or more of the parties to the indenture should have a legitimate or illegitimate son, whom the father should by writing or by his will desire to have introduced to the said business, and who should live to attain the age of sixteen, the party or parties to the indenture, who should so carry on the said business of a banker, should take such son, whether legitimate or illegitimate, apprentice for five years; and after the expiration of such apprenticeship should receive him into the partnership, then carried on by any of the parties, and admit him to an equal share with the then partners, so soon after his age of 21 as might be; but not till after 20 years from the date of the indenture. . . .

The bill was filed by that illegitimate son, having attained sixteen years of age, against the partners, praying, that the Defendants may be decreed specifically to perform the agreement in the said indenture, and take the Plaintiff apprentice, and at the expiration of the appren-

ticeship admit him to an equal share of such business &c. . . .

The Lord Chancellor (Eldon). . . . As to the question, whether this Court would decree execution of such a covenant, if the law had determined, that he might have damages against them for refusing to take him apprentice, it would be difficult to refuse him the ordinary relief this Court gives; but what rule is to form his share of the profits? With respect to the object of this covenant, no one ever heard of this Court executing an agreement for a partnership, when the parties might dissolve it immediately afterwards.

I am of opinion, this is such a covenant, as this Court cannot specifically execute.

The bill was dismissed.

# CHAPTER II. SPECIFIC PERFORMANCE OF CONTRACTS.

## SECTION I. IN GENERAL

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### DARST v. KIRK.

(Supreme Court of Illinois, 1907, 230 Ill. 521, 82 N. E. 862.)

HAND, C. J. . . . The law is well settled that parties to a suit cannot ordinarily confer jurisdiction upon a court over the subject-matter of a suit by stipulation or consent where by law the jurisdiction of the subject-matter of the suit has been conferred upon another court. To illustrate: The parties to an action at law could not, by stipulation or consent, confer upon a court of chancery jurisdiction to try an action of trespass or slander, and in such case the decree of the court, if entered, would doubtless be a nullity, although the jurisdiction of the court passed unchallenged. There is, however, another class of cases, involving matters of contract and the like, which, while they do not come within the ordinary jurisdiction of a court of equity, yet only want some equitable element to bring them within such jurisdiction, and in such cases the defendant by his action may estop himself to afterward raise the question of jurisdiction in the trial or upon appeal. In both cases there is a want of jurisdiction. In the first there is a total want of power to hear and determine the case, and in the other the want of power is not absolute, but qualified. In the first class a stipulation or consent conferring jurisdiction would be void, while in the latter class it would be binding upon the parties. (Richards v. Lake Shore and Michigan Southern Railway Co., 124 Ill. 516.) In this case a partnership had existed between the appellant and appellee, and while they had transferred the partnership property and business to the corporation organized by them under the name of the Rex Manufacturing Company, it does not appear that there had been a settlement of said partnership matters between them, and the

stock for which the $3,000 was received was stock of the corporation received in payment of the partnership business turned over to the corporation.

The settlement of partnership matters and the adjustment of partnership accounts are fruitful sources of litigation and fall within the jurisdiction of courts of equity. If the appellant had been brought into a court of chancery by the filing of a bill and the service of process to answer for non-payment of said $1,200 in the first instance, there might have been some force in the position that he should have been sued for said sum of $1,200 in an action at law; but he having been sued in an action at law and thereafter stipulated that the case should be transferred to the chancery side of the docket of the court where it was pending, and that the pleadings should be amended and the case should thereafter proceed as a chancery suit, in view of the fact that the subject-matter of the suit grew out of a partnership matter, we think the suit should be held to fall within the second class of cases above referred to, and that this is a case in which jurisdiction may be conferred upon a court of chancery by the stipulation or consent of the parties, and that the appellant should be held to be estopped by said stipulation from raising the question of the want of jurisdiction in a court of chancery to hear and determine this cause. City of Chicago v. Drexel, 141 Ill. 89; Mertens v. Roche, 39 N. Y. App. Div. 398. . . .

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## ST. LOUIS RANGE CO. v. KLINE-DRUMMOND MERCANTILE CO.

(Missouri Court of Appeals, 1906, 120 Mo. App. 438, 96 S. W. 1040.)

GOODE, J. . . . The case is that of a vendee of personal property who has refused to accept the goods bought, and as different rules for the measurement of damages are laid down in such cases according to the circumstances presented, it is essential to fix in mind the important facts of the present controversy. At the time of defendant's refusal to accept any more ranges, plaintiff had on hand six hundred and three, of which about twenty-five were completed and ready for delivery and all the parts of the others were manufactured and ready to be put together. . . .

If the buyer of personalty refuses to accept the subject-matter of the bargain when tendered by the seller in proper condition and at the proper time and place, the law allows the seller several modes of redress. If the contract has been so far performed by the seller that the property is ready for delivery before he has notice or knowledge of the buyer's intention to decline acceptance, he may treat the property as belonging to the buyer, hold it subject to the latter's order and recover the full agreed price; or he may sell it for the buyer's account, taking the requisite steps to protect the latter's interest and get the best price obtainable, and then recover the difference between the proceeds of the sale and the agreed price; or he may treat the sale as ended by the buyer's default and the property as his (the seller's) and recover the actual loss sustained, which is ordinarily the difference between the agreed price and the market price. (Dobbins v. Edmonds, 18 Mo. App. 307, 317; Kingsland v. Iron Co., 29 Mo. App. 526; Lumber Co. v. Chicago Lumber Co., 51 Mo. App. 555; Richey v. Tenbroek, 63 Mo. 563; Hayden v. Demetz, 53 N. Y. 426, 431.) Where specific articles are sold, and especially where they are manufactured pursuant to an order from the vendee, the title is regarded, usually, as having vested in the latter without delivery, so as to give the vendor the right, on refusal to accept, to recover the stipulated price. Under such circumstances the case presented is different from that of a sale of goods generally, like merchandise or corporate stocks currently dealt in, when it is contemplated that specific articles or stocks shall be subsequently selected and delivered pursuant to the contract. (Bethel St. Co. v. Brown, 57 Maine 9; Page v. Carpenter, 10 N. H. 77; Brookwalter v. Clark, 10 Fed. 793; Shawhan v. Van Nest, 25 Ohio St. 490; Mitchell v. LeClaire, 165 Mass. 305.) The decisions holding vendees responsible for the full contract price in cases of specific articles manufactured for them, proceed on the assumption that they have acquired title to the property and that it is held subject to their order, or else that it is worthless in the hands of the vendors so that the latter cannot partly reimburse themselves for their loss by using or disposing of it. (Black River Lumber Co. v. Warner, 93 Mo. 374, 6 S. W. 210; Crown Vinegar & Spice Co. v. Whers, 69 Mo. App. 493; Brookwalter v. Clark, *supra.*) In the Missouri cases just cited, the property sold had been manufactured and was ready for delivery. The opinion in Lumber Co. v. Warner says that when the subject-matter of the contract is specific articles made for the vendee, and the vendor has com-

pleted his contract, it is just that the damages in case of refusal to accept the goods shall be their contract price; but that the vendor will hold the property for the vendee. In Mitchell v. LeClair, *supra* the defendant had ordered sixty tubs of butter which plaintiff set apart for him, but he subsequently refused to take it. Referring to these facts, the court said that if the vendee in such case refused to take the goods and pay for them, the vendor might recover the price, if he kept the goods in readiness for delivery to the purchaser. It sometimes happens, as in the instance of a suit of clothes made for a person, or a portrait painted for him, that the thing sold is obviously worthless to any one else and then, we apprehend, the seller could recover the full price on the purchaser's refusal to accept without regard to whether the contract was still executory, provided it had been performed to the extent of having the subject-matter of it ready for delivery. (Allen v. Jarvis, 20 Conn. 38.) This is not such a case; for it is apparent that the unaccepted ranges had a value either as scrap iron or as ranges; and, indeed this proposition is conceded. We have said that plaintiff did not elect either to hold the ranges as defendant's property to be delivered on demand, or sell them for defendant as its agent. On the contrary plaintiff treated the ranges as its own and proceeded to sell them from time to time. In view of this fact, defendant is entitled to a deduction of the value of the ranges from the agreed price. . . .

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## MOSS & RALEY v. WREN.

(Supreme Court of Texas, 1909, 102 Texas 567, 113 S. W. 739, 120 S. W. 847.)

GAINES, C. J. . . . The appellants were employed as real estate brokers to make sale of certain land belonging to appellee, and having effected, as they claimed, a sale to one Clark, brought suit for their commission. In the contract for the conveyance of the land, after specifying the price, consideration, etc., the following stipulation was inserted: "And it is further mutually agreed in case purchaser fails to comply with the terms hereof relating to the payment and securing of the purchase price as above mentioned and by the time herein designated, purchaser shall forfeit the amount paid hereon to seller and

the same shall be paid to seller by said trustees and accepted by said seller as and for liquidated damages for such injury and damage as the seller may suffer by reason of the nonperformance of this contract on the part of the purchaser."

The question certified for our determination is, whether upon this contract a sale was effected so as to entitle the appellants to their commission.

We have numerous decisions holding that, although there is a stipulation in the contract of this character, payment of a fixed sum of money as liquidated damages does not affect the contract for sale of the land but that the seller can enforce specific performance. (Hemming v. Zimmerschitte, 4 Texas, 159; Williams v. Talbot, 16 Texas, 1; Vardeman v. Lawson, 17 Texas, 11; Bullion v. Campbell, 27 Texas, 653; Gregory v. Hughes, 20 Texas, 345).

It seems to us that these decisions are decisive of the case. If the vendor of the land can enforce a specific performance of the contract to pay for it, then the broker has effected a sale, valid in law, and is entitled to his compensation. We have also examined the authorities cited in the certificate upon the same proposition and find it is amply supported by them. (Lyman v. Gedney, 29 N. E., 282; Hull v. Sturdivant, 46 Me., 34; Hooker v. Pynchon, 74 Mass. (8 Gray), 550; Ewins v. Gordon, 49 N. H. 444; O'Connor v. Tyrrell, (N. J. Eq.), 30 Atl., 1061; Palmer v. Bowen, 34 N. E., 291, affirming s. c. in 18 N. Y. Supp., 638; Kettering v. Eastlack, 107 N. W., 177).

We therefore answer the question submitted in the affirmative and say that the contract is such that appellee is entitled to have it specifically enforced, and that therefore the appellants are entitled to their commission for making the sale.

Opinion filed December 2, 1908.

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ON REHEARING.

GAINES, C. J. Upon consideration of the motion for a rehearing in this case we are of opinion that we erred in disposing originally of the question.

Referring to the stipulation quoted at the end of the statement of the case it is to be noted that it provides that the $1,000 put up as

a forfeit "shall be paid to the seller by said trustees and accepted by said seller as liquidated damages for such injury and damage as the seller may suffer by reason of the non-performance of this contract on part of the purchaser." Now, it occurs to us that if nothing had been said as to the acceptance of the $1,000 by the seller, our original opinion would have been correct. But if the seller is bound to accept the sum for such damages as may be suffered by reason of the non-performance of the contract on part of the purchaser, can he sue the proposed purchaser for specific performance of the contract? The contract evidently was that the proposed purchaser should have until a future day to pay the price and accept a conveyance, yet should he decline for any reason to pay the price and to accept the land, he may pay the liquidated damages and be absolved from further suit.

Moss & Raley entered into a contract with Clark to sell him certain lands and stipulated that in case he failed to buy, he should forfeit $1,000 which had been put up to enforce the bargain. He chose to forfeit the $1,000 which absolved him from further obligation.

Before Moss & Raley were entitled to their commission they should have procured a purchaser who was willing to enter into a contract to purchase the land absolutely.

For this reason we answer the question in the negative.

Opinion filed June 23, 1909.

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## DILLS v. DOEBLER.

(Supreme Court of Errors of Connecticut, 1892, 62 Conn. 366, 26 Atl. 398.)

ANDREWS, C. J. The plaintiff and defendant in June, 1890, entered into a contract for the lease of certain rooms in the city of Hartford and the practicing of dentistry therein, the eighth paragraph of which contained these clauses:—

"And the said Doebler, in consideration of the premises, does further covenant and agree to and with the said Dills, that he, the said Doebler, will not, at any time within ten years after the termination of this contract, engage in or carry on directly or indirectly within the limits of fifteen miles of said Hartford, the business or profession of a dentist, or any branch of the same, either as principal, employee,

agent or partner, or in any manner or form or in any capacity whatever:—Provided, and it is hereby understood and agreed by and between the parties hereto, that in the event of the said Dill's failure to retain said rooms for said practice by reason of the said Dills-Hinckley lease, then and in that event this section of the contract becomes void by said Doebler paying to said Dills five hundred dollars, and giving bond in like sum that he, the said Doebler, will not use the term 'Associate Dentists' in connection with announcing or advertising a future practice of dentistry in said Hartford. . . . And it is further mutually understood and agreed by and between the parties hereto that the said Doebler may be at liberty to practice dentistry in said Hartford at any time after the termination of this contract, by the paying to said Dills of one thousand dollars, and giving such bond as is hereinbefore alluded to in reference to the term 'Associate Dentists.'". . .

An examination of the agreement between these parties makes it evident that they were contracting upon the theory that the defendant was to resume the practice of dentistry in Hartford upon his own accord when the contract should be terminated. He was of course to pay for the right so to resume. The section quoted in its earlier part spoke of a termination of the contract by reason of the failure of the plaintiff's title to the rooms. In such event it is entirely certain that the defendant would have the right to engage in dentistry upon paying four hundred dollars, for it is provided that the section was then to become void. The latter part of the section speaks of the termination of the contract from any other cause. Then the defendant is required to pay one thousand dollars in order "to be at liberty to practice dentistry in said Hartford." In the one case the defendant was to pay four hundred dollars, in the other one thousand. But in respect to his liberty to resume business on his own account there is no distinction. In either case the contract stipulates for damages and not for the removal of competition. The contract presents an alternative. It virtually says to the defendant—"If you enter into the business of dentistry in Hartford after the termination of this agreement, you must pay to the plaintiff the damages named."

The language used indicates this thought; and there is nothing in the relation of the parties, or in the business of dentistry, nor in the surrounding circumstances, to indicate otherwise. Presumably

there are many dentists in the city of Hartford. Lessening their number by one could not benefit the plaintiff in any perceptible degree. Nor would the defendant by practicing there be likely to injure the plaintiff at all seriously. The plaintiff having contracted to take damages must seek his remedy in a court of law.

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## FOSTER v. KIMMONS.

(Supreme Court of Missouri, 1874, 54 Mo. 488, 26 Am. Dec. 661, 663 note.)

VORIES, J. . . . In the case under consideration, the evidence shows, that the contract, which is asked to be specifically performed, was a gift of a piece of land, upon which is situated a celebrated spring; that the defendant, or donor, had a larger tract of land at and constituting the spring tract; it is not pretended that the whole tract of land was included in the gift; no mention is made in the evidence of the quantity of the land given, either by referring to its legal subdivisions, or otherwise. The only evidence, tending in that direction, is, that the defendant, while riding over the land, had pointed out to the witness a tree at a considerable distance, which he supposed was near where one corner of the land would be, and he had also stated the course which he supposed one line of the land would run. This is the only description given, while the evidence clearly shows, that the son, to whom the land is charged to have been given, did not claim the whole of the spring tract. It is impossible, therefore, to ascertain from any contract or gift proven what part, or how much, of the tract was given or intended to be given; the only evidence being, that one line of the land was supposed to be near a certain tree, without anything to indicate the number of acres given, or where the other lines were, or were supposed to be. It must at once be perceived, that it would be impossible for a court of equity to specifically perform the contract, and know the very contract made, or intended by the parties, was being performed as to the quantity and boundaries of the land. The court would have to first make the contract, and then perform it. This a court of equity can never do. It follows, that the plaintiffs' petition was, for this reason, properly dismissed.

## PADDOCK v. DAVENPORT.

(Supreme Court of North Carolina, 1890, 107 N. C. 710, 12 S. E. 464.)

SHEPHERD, J. Two causes of action are set out in the complaint,—one for damages for breach of the contract, and the other for its specific performance. The court held, upon demurrer, that neither of the said causes of action could be maintained. . . .

The second cause of action is for specific performance, both against Davenport, who executed the contract, and Thrash, who purchased of him with notice of the claim of the plaintiff. The true principle upon which specific performance is decreed does not rest simply upon a mere arbitrary distinction as to different species of property, but it is founded upon the inadequacy of the legal remedy by way of pecuniary damages. This principle is acted upon where there is a peculiar value attached to the subject of the contract which is not compensable in damages. The law assumes land to be of this character "simply because," says Pearson, J., in Kitchen v. Herring, 7 Ired. Eq. 191, "it is land,—a favorite and favored subject in England, and every country of Anglo-Saxon origin." The law also attaches a peculiar value to ancient family pictures, title-deeds, valuable paintings, articles of unusual beauty, rarity, and distinction, such as objects of vertu. A horn which, time out of mind, had gone along with an estate, and an old silver patera, bearing a Greek inscription and dedication to Hercules, were held to be proper subjects of specific performance. These, said Lord Eldon, turned upon the *pretium affectionis,* which could not be estimated in damages. So, for a faithful family slave, endeared by a long course of service or early association, Chief Justice Taylor remarked that "no damages can compensate, for there is no standard by which the price of affection can be adjusted, and no scale to graduate the feelings of the heart." Williams v. Howard, 3 Murph. 80. The principle is also applied where the damages at law are so uncertain and unascertainable, owing to the nature of the property or the circumstances of the case, that a specific performance is indispensable to justice. Such was formerly held as to the shares in a railway company, which differ, says the court in Ashe v. Johnson, 2 Jones, Eq. 149, from the funded debt of the government, in not always being in the market and having a specific value; also a patent,

(Corbin v. Tracy, 34 Conn. 325); contract to insure (Carpenter v. Insurance Co., 4 Sandf. Ch. 408); and like cases. The general principle everywhere recognized, however, is that, except in cases falling within the foregoing principles a court of equity will not decree the specific performance of contracts for personal property; "for," remarks Pearson, J., in Kitchen v. Herring, supra, "if, with money, an article of the same description can be bought, . . . the remedy at law is adequate." See, also, Pom. Spec. Perf. 14. Applying these principles to the facts alleged in the complaint, it must follow, we think, that this is not a case which calls for the excercise of the equitable power of the court. The trees were purchased with a view to their servance from the soil, and thus being converted into personal property. It is not shown that they have any peculiar value to the plaintiff, nor does there appear any circumstances from which it may be inferred that the breach of the contract may not be readily compensated for in damages. Neither is it shown that other trees may not be purchased, but it is simply alleged that they are scarce at the contract price. The simple fact that they are near a water-course does not alter the case, for the conveniences of transportation are elements which may be considered in the estimation of the damages. Neither is the circumstance that the plaintiff purchased "a few trees of like kind," in the vicinity, sufficient to warrant the equitable intervention of the court. We can very easily conceive of cases in which contracts of this nature may be specifically enforced, but we can see nothing in this complaint which calls for such extraordinary relief. The ruling of the court as to this branch of the case is sustained. . . .

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## SECTION II.—AFFIRMATIVE CONTRACTS

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### GARTRELL v. STAFFORD.

(Supreme Court of Nebraska, 1882, 12 Nebr. 545.)

MAXWELL, J. This is an action to enforce the specific performance of an alleged contract for the conveyance of real estate. . . .

The second objection of the appellant is that the plaintiff has an adequate remedy at law in an action for damages. The rule contended for by the appellant undoubtedly applies to contracts for the sale of personal property, the reason being that damages in such cases are readily calculated on the market price of property such as wheat, corn, wool, etc., like quantities of the same grade being of equal value, and thus afford as complete a remedy to the purchaser as the delivery of the property. Adderley v. Dixon, 1 Sim. & Stu. 607. But the rule is a qualified one and is limited to cases where compensation in damages furnishes a complete and satisfactory remedy. Story's Eq., S. 718, and cases cited in note 3. The jurisdiction of courts of equity to decree specific performance of contracts for the sale of real estate is not limited, as in cases respecting chattels, to special circumstances, but is universally maintained, the reason being that a purchaser of a particular piece of land may reasonably be supposed to have considered the locality, soil, easements, or accommodations of the land, generally, which may give a peculiar or special value to the land to him, that could not be replaced by other land of the same value, but not having the same local conveniences or accommodations. Adderley v. Dixon, 1 Sim. & Stu., 607, Story's Eq., sec. 746. Willard's Eq., 279. An action for damages would not, therefore, afford adequate relief.

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## LOSEE v. MOREY.

(Supreme Court of New York, 1865, 57 Barb. 561.)

BOCKES, J. . . . As a general rule, the specific performance of contracts rests in the discretion of the court. It is not, however, an individual or arbitrary discretion, but a judicial discretion which conforms itself to general rules and settled principles. The right to have specific performance is a positive right, neither to be exercised or withheld capriciously, or simply at will. When all is fair, and the parties deal on equal terms, it is a universal rule, in equity, to enforce contracts for the sale of lands specifically, at the demand of either the vendor or vendee; and in such case it is as much the duty of the court to decree specific performance of the contract as it is

to give damages for its breach. (Willard's Eq. 280. Story's Eq. No. 746, 751, 9 Vesey, 608. 12 id. 395, 400. 3 Cowen, 445. 6 Bosw. 245.) In the last case cited the court remarks that the discretion to be exercised in these cases, "is governed, for the most part, by settled rules; and where a plaintiff is seeking a relief to which by such rules he is clearly entitled, and no substantial defense to his claim is established, the relief may not be capriciously denied." It follows, therefore, that if a contract for the sale and purchase of lands has been fairly obtained, without misapprehension, surprise, mistake or the exercise of any undue advantage, and it be not unconscionable in its terms, the right of the parties to its specific performance is a settled and positive right, which the court is bound to maintain and enforce. It is insisted, in the next place, that the case is not of equitable cognizance, because the plaintiff has, as is urged, a perfect remedy at law, on the contract, for damages. This objection is not available in a case like this, where the contract is for the purchase and sale of lands. In such case the vendee is not deemed to have a perfect remedy in an action at law for damages. He is entitled to the land, according to the terms of the purchase. A compensation in damages will not afford adequate relief; "for the peculiar locality, soil, vicinage, advantage of markets and the like conveniences of an estate contracted for, cannot be replaced by other land of equal value."

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## LEACH & WIFE v. FOBES.

(Supreme Court of Massachusetts, 1858, 11 Gray (Mass.) 506.)

BIGELOW, J. . . . Nor have we any doubt as to the right of the plaintiffs to ask for the enforcement of this contract by a decree in chancery. The remedy at law is not adequate and complete. The agreement is not one for the transfer of shares in a corporation merely. It is a contract also for the conveyance of a certain right or interest in real estate, which is an appropriate subject for specific relief in equity. The court has jurisdiction to decree that the land which is the subject of the agreement shall be conveyed to the plaintiffs; and, as it will give relief for this part of the contract, it will also entertain jurisdiction of the whole agreement, and enforce the other stipulations

respecting the transfer of shares in the incorporated companies named in the bill, instead of turning the party over to seek his remedy therefor by an action at law. The more recent authorities are quite decisive as to the authority of a court of chancery to decree the specific performance of a contract for the transfer of shares in joint stock companies or corporations, in cases in which it appears that the capital stock is fixed at a certain amount and the number of shares is limited. Duncuft v. Albrecht, 12 Sim. 189, Shaw v. Fisher, 2 De Gex & Sm. 11, and 5 De Gex, Macn. & Gord. 596, Cheale v. Kenward, 3 De Gex & Jon. 27. But without deciding whether a suit in equity can be supported for sole purpose of enforcing a contract for the sale of shares in a corporation, we are of opinion that such an agreement may be enforced in equity when it forms part of a contract for the sale and transfer of real estate, and the suit is brought for the conveyance of the land as well as for the transfer of the shares. Decree accordingly

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## McNAMARA et al. v. HOME LAND & CATTLE CO. et al.

(Circuit Court of Montana District, 1900, 105 Fed. 202.)

KNOWLES, D. J. . . . The case was brought to compel the specific performance of a contract for the sale and delivery of certain personal property, described in the bill herein, and situated within the state of Montana. . . . It is evident that this construction of the contract contended for on the part of the said cattle company would force the complainants to seek redress for said cattle company's breach of this contract in the state of Missouri, and that the complainants could not have done so with any assurance of obtaining complete redress in Montana. It is an important consideration in this case as to whether sufficient equities have been presented to justify this court in awarding specific performance of this contract. The master has found that the cattle company is solvent. He has found, however, that the property of said company chiefly consists of an indebtedness due it from the St. Louis Stamping Company, a Missouri corporation and doing business in that state. What the nature of this indebtedness is, and how it is evidenced does not appear. When such indebtedness becomes due is also a matter not in evidence, or determined by the

findings of the master. A party should not, under the circumstances presented by this case, be compelled to seek a foreign jurisdiction to collect damages for the breach of a contract when he has in his own hands the means of remunerating himself therefor. Johnson v. Brooks, 93 N. Y. 343. In the case of Clark v. Flint, 33 Am. Dec. 733, it is held that, where the remedy at law would be against a person actually insolvent, such legal remedy would not be adequate, and would be a ground for equitable jurisdiction. In 22 Am. & Eng. Enc. Law, 992, it is stated that the insolvency of a defendant is a ground for equitable relief, where the specific performance of a contract for the sale of chattels is presented. As far as the defendant the Home Land & Cattle Company is concerned, I think it may be treated as if insolvent in Montana. It had not the means wherewith to liquidate complainants' claims on account of the deficiency of the cattle above mentioned, if complainants paid to the defendant bank the amount due for the last delivery of cattle made to them. The cattle gathered by the defendant the Home Land & Cattle Company in the year 1898 were upon the range, and scattered, and it would seem unjust to require a creditor to hunt them up in order to render them subject to his demand. With this view of the law and the facts presented in this case, I have reached the conclusion that sufficient equities are presented to entitle complainants to the relief prayed for in their bill. It is therefore ordered that complainants have a decree for the specific performance of this contract as to the cattle and horses described in the bill.

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## CORBIN v. TRACY.

(Supreme Court of Connecticut, 1867, 34 Conn. 325.)

Bill in equity, brought by the petitioners, a joint stock corporation, to the superior court for Hartford county, to compel the specific performance of a contract to assign a patent right. The superior court (Loomis, J.) passed a decree in favor of the petitioners, and the respondents filed a motion for a new trial and a motion in error. The case is sufficiently stated in the opinion.

Carpenter, J. . . . The ground of the jurisdiction of a court of equity in this class of cases, is, that a court of law is inadequate

to decree a specific performance, and can relieve the injured party only by a compensation in damages, which, in many cases, would fall far short of the redress which his situation might require. Whenever, therefore, the party wants the thing *in specie,* and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. They will decree the specific performance of a contract for the sale of lands, not because of the peculiar nature of land, but because a party cannot be adequately compensated in damages. So in respect to personal estate; the general rule that courts of equity will not entertain jurisdiction for a specific performance of agreements respecting goods, chattels, stocks, choses in action, and other things of a merely personal nature, is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy. 2 Story's Eq. Jur. Nos. 717, 718.

The jurisdiction, therefore, of a court of equity does not proceed upon any distinction between real estate and personal estate, but upon the ground that damages at law may not in the particular case, afford a complete remedy. 1 Story's Eq. Jur., §§ 716, 717, 718 and cases there cited; Clark v. Flint, 22 Pick., 231. When the remedy at law is not full and complete, and when the effect of the breach cannot be known with any exactness, either because the effect will show itself only after a long time, or for any other reason, courts of equity will enforce contracts in relation to personalty. 3 Parsons on Contracts (5th ed.) 373.

An application of these principles to the case before us relieves it of all difficulty. The contract relates to a patent right, the value of which has not yet been tested by actual use. All the data by which its value can be estimated are yet future and contingent. Experience may prove it to be worthless; another and better invention may supersede it; or it may itself be an infringement of some patent already existing. On the other hand it may be so simple in its principle and construction as to defy all competition, and give its owner a practical monopoly of all branches of business to which it is applicable. In any event its value cannot be known with any degree of exactness until after the lapse of time; and even then it is doubtful whether it can be ascertained with sufficient accuracy to do substantial justice between the parties by a compensation in damages. On the whole we are satisfied that justice can only be done, in a case like this, by a specific performance of the contract.

## LEWIS v. LORD LECHMERE.

(English Court of Chancery, 1721, 12 Modern Reports, 504.)

This was a bill brought by the plaintiff for a specific performance of articles, bearing date the thirtieth day of August 1720, whereby Lord Lechmere had covenanted to purchase such an estate at forty years purchase; provided the plaintiff did, on or before the tenth day of November following, lay such an abstract of the title before Lord Lechmere's Counsel, as they should approve. . . .

It was said by the counsel for the defendant, that though in case of articles entered into for the purchase of lands, the vendee may undoubtedly exhibit his bill in equity for the specific performance of these articles; yet it might admit of a doubt, whether the vendor might do the same. As to the vendee, though he has an action at law upon the articles, yet that sounds only in damages; and therefore he may come into equity for the land, which on several accounts may possibly be more desirable to him than any pecuniary compensation. But for the vendor, he only desires to have the money; and that, whether it be recovered at law in damages, or in equity, is but money still. If it be said, that at law the jury may at their own liberty and discretion, give him what damages they upon all the circumstances of the case think reasonable; whereas upon a bill in equity, your lordship has no power to vary from the sum contracted for in the articles, be the circumstances of the case what they will; this seems to be a very odd reason for coming into a court of equity, and the reverse of what generally intitles people to relief in equity.

But to this it was answered, that upon mutual articles there ought to be mutual remedies: that if the vendee had a remedy both in law and equity, the vendor would not be upon a par with him, unless he had so too; that the remedy the vendor had at law, was not a remedy adequate to what he had in this court; for at law they only could give him the difference in damages, whereas he might for particular reasons stand in need of the whole sum. . . .

## GOTTSCHALK v. STEIN & LEOPOLD.

(Court of Appeals of Maryland, 1888, 69 Md. 51.)

Robinson, J. . . . Now in this case; the appellant agreed to sell to the appellees the three promissory notes of Weiller & Son, and the appellees agreed to buy these notes for a specific purpose, which was known to the appellant. An action at law for a breach of the contract, would not, it is clear, give to the appellees the subject-matter of the contract. And besides, the damages to be recovered must necessarily be uncertain. The face value of the notes is seven thousand five hundred dollars, and the appellant agreed to sell and transfer them to the appellees, upon the payment of three thousand dollars. If the firm of Weiller & Son was perfectly solvent, there would be no difficulty in determining the measure of damages. But the firm, the record shows, was insolvent, their assets being insufficient to pay their debts. And in an action at law the measure of damages would depend upon the personal ability of the members of the firm to pay the amount due on the notes, and this being uncertain, the damages to be recovered must also be uncertain. The legal remedy under such circumstances would fall short of that redress to which the appellees are justly entitled, and is not, therefore, as beneficial to them as the specific performance of the contract.

There is no distinction, it seems to us, between this case and Wright and others v. Bell, 5 Price, 325. There the assignees in bankruptcy, agreed to sell a debt of £550 due the bankrupt for £500, and the defendant having refused to pay the £500, a bill was filed for the specific performance of the contract, and it was argued that the remedy of the plaintiff was by an action at law for a breach of the contract. But the Lord Chief Baron held, that although equity would not, as a general rule, enforce the performance of contracts, for the sale of chattels, yet a contract to sell a specific debt, was an exception to the rule. And then again in Adderley v. Dixon, 1 Sim. & Stu., 607, where the plaintiff being entitled to a dividend in two bankrupt estates, agreed to sell the claims for 2s. and 6d. in the pound, Sir. John Leach, Vice-Chancellor, said:

"Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because

damages at law may not, in the particular case, afford a complete remedy. The present case being a contract for the sale of the uncertain dividends which may become payable from the estates of the two bankrupts, it appears to me that, upon the principle established by the cases of Ball v. Coggs, 1 Bro. P. C., 140, and Taylor v. Neville, (cited in 3 Atk., 384,) a Court of equity will decree specific performance, because damages at law cannot accurately represent the value of the future dividends; and to compel this purchaser to take such damages, would be to compel him to sell these dividends at a conjectural price." So in this case, the damages at law being uncertain on account of the failure of Weiller & Son, the appellees are entitled to the specific performance of the contract.

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## RUTHERFORD v. STEWART.

(Supreme Court of Missouri, 1883, 79 Mo. 216.)

HENRY, J. This is a proceeding by injunction to restrain defendants from taking and using certain brick made by Helflin & Sheperdson on a tract of land owned by plaintiff. Helflin & Sheperdson agreed to manufacture brick and pay Rutherford for the use of the ground, and gave him a mortgage to secure him the price they were to pay and for certain advancements of money for them, upon one kiln of bricks, to contain 100,000 bricks. . . .

Afterward, on the 22nd day of July, 1878, said mortgagor executed to defendant Stewart, a mortgage of "all the bricks now being moulded at the brick-yard, on the land of W. T. Rutherford. . . . and all the bricks that will be moulded and turned at said brick-yard, during the season for such work of 1878, commencing on the 29th day of July, 1878," to secure a promissory note of that date for $250, payable to said Stewart. . . .

A second mortgage was executed by said Sherperdson & Helflin to Rutherford, after the second kiln was burned, to secure a debt to Rutherford of $502, advanced by Rutherford and used by the firm, to make said brick. . . .

The only question in the case is whether the mortgage to Stewart was a valid mortgage, the appellant contending that it was of personal

property not then in existence, and, therefore, conveyed nothing. Of the brick then made, it was certainly a good conveyance, and that, in equity, it covered all the brick made when Rutherford took his second mortgage, we think equally clear. As between Stewart and the mortgagers, and persons claiming under the latter, with actual notice of the mortgage, the mortgagee's equitable right to the property would seem to be unquestionable. If the entire kiln was completed when plaintiff took his second mortgage, he took it subject to the first, and on no principle of equity, can he be entitled, as against Stewart, to any of the bricks except such as were made after his, Rutherford's mortgage was executed.

That the mortgage of Stewart took effect upon the bricks in the kiln when it was executed, is not questioned. The other propositions above stated, were discussed in Wright v. Bircher, 72 Mo. 179, in which this court approved what was said by Mr. Justice Story in Mitchell v. Winslow, 2 Story 630, and by Davis, J. in Morrill v. Noyes, 56 Me. 458; s. c., 3 Am. L. Reg. (N. S.) 18. Justice Story observed: "It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether *in esse* or not, it attaches, in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires title thereto, against the latter and all persons asserting a claim thereto, either voluntarily or with notice, or in bankruptcy." . . .

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## CARPENTER v. THE MUTUAL SAFETY INSURANCE COMPANY.

(New York Court of Chancery, 1846, 4 Sandf. Ch. 436.)

Demurrer. The bill set forth an agreement for insurance made by the authorized agent of the defendants, the terms of which were fully stated, the payment of the stipulated premium by the complainant to the defendants, and the omission of the latter to execute a policy of insurance conformably to the agreement, on being requested. The bill also stated the loss of the premises insured, and the complainant's consequent right to recover the amount agreed to be insured.

The prayer was for a payment of the loss and for general relief. The defendants demurred to the bill for want of equity. . . .

THE VICE-CHANCELLOR. The circumstance that the bill seeks performance of a contract relating to personal property, is not of itself a valid ground of demurrer. There are many instances in which equity compels a specific performance of such contracts.

The real, serious objection to the bill, is that the complainant has an adequate remedy at law.

I think, however, that it is now the established doctrine, that the insured may, in such a case, resort to a court of equity.

In Perkins v. The Washington Insurance Company, 4 Cowen, 645, our highest court maintained a suit like this in all respects. The defendant there was a corporate body, which answers under its seal and makes no discovery.

It is true that the report of the case does not show any discussion of the question of jurisdiction in the court below, or that the point was presented. But the severe litigation of the cause, the eminent counsel engaged in it, and the opinion of Senator Colden, furnish strong evidence that the law was deemed to be too well settled, to warrant any debate in regard to it.

That learned judge says, in his opinion (p. 661), that the receipt for the premium "answers all the use of a policy, except that the latter authorizes the assured, in case of loss, to sue in a court of law, instead of being obliged to resort, as in this case, to a court of chancery."

The case cited has ever since been regarded as decisive of the jurisdiction in equity. Thus, the now chief justice, in delivering the opinion of the supreme court, in Lightbody v. The North American Fire Insurance Company (23 Wend. 18, 25), speaking of a state of facts similar to those in this bill, says, "if his remedy at law was questionable" (and the judge thought he had such a remedy by an action on the case), "he had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper forum;" citing Perkins v. The Washington Insurance Company. . . . With these authorities, and I may add, the very general understanding of the profession for a long period that such is the law, I have no doubt as to the jurisdiction in this case. It surely can make no difference in respect of the jurisdiction, that the loss insured against has occurred.

The only ground upon which it can be maintained, is for a specific performance by the execution and delivery of a policy. The further relief by decreeing payment, where there has been a loss, is merely incidental, and to avoid expense. Now take the instance of an agreement to insure, where there has been no loss. The right of the assured to receive a policy is perfect and may be enforced immediately, the premium having been paid. An action at law in such a case would be worse than useless to him, for he could recover no more than nominal damages. The value of a policy, previous to a loss, would not be sufficient to carry the costs of a suit at law.

In this respect it is wholly unlike the contract to deliver bills or notes payable at a future day, on a sale of goods. There, on a failure to deliver the bills or notes, an action lies upon the special agreement, in which the damages may be at once ascertained and full justice done, by giving the price of the goods sold. Here, after a barren recovery at law for the non-delivery of the policy, if a loss occurred, another suit must be brought for the real damages; and in the second suit, the assured would probably encounter a plea setting up the first recovery as a bar to a further prosecution.

It is obvious that a suit at law, before a loss, is an inadequate, if not a fatal mode of redress. And as I have remarked, the principle of the jurisdiction in equity, is the same whether a loss has occurred or not. It therefore cannot be taken away or impaired, if perchance the remedy at law, when first invoked after a loss, may lead to the same results.

The demurrer must be overruled with costs, and the usual order entered.

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## STUART v. PENNIS.

(Supreme Court of Virginia, 1895, 91 Va. 688, 22 S. E. 509.)

RIELY, J. This is a suit in equity to compel the specific performance of a contract in writing for the sale of growing timber trees. Upon a demurrer to the bill, it was dismissed by the court.

There was and could be no objection urged against the relief sought growing out of any indefiniteness as to the terms of the contract, or as to its subject-matter. The defense of the appellee was that the subject of the contract was personal property, and not an interest in

real estate; and being personal property, and there also being an adequate remedy at law for the breach of the contract, a court of equity would not specifically enforce it.

On the other hand, counsel for the appellant claimed that standing trees so pertain to the soil that a contract for their sale is in law a sale of an interest in land; and that as under the general rule, a court of equity will always enforce, in a proper case, the specific performance of a contract for the sale of land (2 Minor's Inst. 867; and Pomeroy on Specific Performance of Contracts, sec. 10), such relief should have been granted in this case. . . .

Land includes everything belonging or attached to it, above and below the surface. It includes the minerals buried in its depths, or which crop out of its surface. It equally includes the woods and and trees growing upon it. Rooted and standing in the soil, and drawing their support from it, they are regarded as an integral part of the land just as are the coal, the iron, the gypsum, and the building stone which enter so largely into the business of commerce. Attached to the soil, they pass with the land as a part of it. A conveyance of the land carries with it to the grantee the right to the forests and trees growing upon it. In the dealings of men, growing timber is ever regarded as a part of the realty. Upon the death of the ancestor they pass with it to his devisee, or descend with it to his heir, and not to his executor or administrator. They are not treated as personalty. They are not subject to levy and sale under execution. And so, upon principle, sound reason, and authority, we are of opinion that they constitute an interest in, or are a part of, the land, and must be so treated by the courts.

We are the better satisfied with the conclusion reached, in that it has the merit of being easily understood and readily applied, not only to this particular industry, but to the many other useful, varied, and boundless natural products of a similar kind of the section of the State whence this case comes, in whose development its people are becoming more largely engaged year by year. But if the contract was not to be treated as a sale of an interest in land, of which it is as much a matter of course for a court of equity to decree a specific performance as it is for a court of law to give damages for the breach of it, we are, nevertheless, of the opinion that it would be a proper case for the enforcement of the contract. While the doctrine is well established that a court of equity will not, in general, decree the specific

performance of contracts relating to chattels, yet it will do so where the remedy at law is inadequate to meet all the requirements of a given case, and to do complete justice between the parties.

The true equity rule is thus laid down in Story's Equity J., sec. 33: "The remedy must be plain; for if it be doubtful and obscure at law, equity will assert a jurisdiction. It must be adequate; for if at law it fall short of what the party is entitled to, that founds a jurisdiction in equity. And it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right of the party in a perfect manner, at the present time, and in future; otherwise, equity will interfere and give such relief and aid as the exigency of the particular case may require."

The remedy at law would fall short in the case at bar of measuring up to this rule. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. Where the fulfillment or execution of a contract may extend through several years, it would be difficult to estimate the damages. His profits, depending in such case on future events, could not be estimated in present damages without being largely conjectural. As is said by Pomeroy in his book on Contracts, sec. 15: "To compel a party to accept damages under such circumstances is to compel him to sell his possible profits at a price depending on a mere guess."

Then again, the trees included within the body of land described in the contract and bought by the appellant have not been marked or counted, and he has been forbidden by the appellee to mark or disturb them. He has no way of ascertaining their number but by going on the land and marking and counting them. After being forbidden to do this, he is without the means of ascertaining the number of the different kinds of trees purchased, and without knowing their number, it is not possible to ascertain his damages. The remedy at law in this case would clearly be neither adequate nor complete.

For the foregoing reasons, we are of opinion that the court erred in sustaining the demurrer to the bill, and the decree complained of must be reversed.

## RECTOR OF ST. DAVID'S v. WOOD.

(Supreme Court of Oregon, 1893, 24 Ore. 396, 34 Pac. 18.)

MOORE, J. . . . The record shows that the stone which defendant agreed to furnish is of a peculiar kind, color, quality, and texture, and that no other stone of like character can be procured; that he had furnished enough of such stone to build about two-thirds of the walls, and if plaintiff cannot procure a sufficient quantity of the same kind to complete the work, it will be necessary to use other stone and thus destroy the beauty and harmony of its building, or the walls must be taken down and rebuilt with other stone; that defendant is insolvent, and therefore unable to complete his contract, although he has received nearly the whole consideration therefor. Under this state of facts, can a court of equity decree a partial performance, so as to carry out as near as possible the original intent of the parties? The contract was to furnish the stone and other material, and erect the walls. The defendant's pecuniary condition precludes a specific performance of that part of his contract which required him to furnish other necessary material and do the labor, if such a decree were possible (Pomeroy, Specific Performance § 293); but if he be incapacitated from performing it in the precise terms, the court will, if it is possible, decree a specific execution according to its substance, by making such variation from unessential particulars as the circumstances of the case require or permit: Idem, § 297.

Courts will not generally decree the specific performance of a contract to deliver personal property (Waterman, Specific Performance, § 16), and yet it was held in Hapgood v. Rosenstock, 23 Fed. Rep. 86, that "agreements for the assignment of a patent, and for the delivery of chattels which can be supplied by the vendor alone, are among those which will be specifically enforced." This decision was approved by the supreme court of Massachusetts in Adams v. Messenger, 147 Mass. 185 (17 N. E. 491). Applying these rules to the case at bar, the defendant has stone which cannot be procured from any other quarry, and plaintiff must use it or the harmony of its building will be marred, and since the defendant cannot be required to do that which his pecuniary condition forbids, he can be negatively required

to specifically perform the contract by compelling him to allow the plaintiff to take the necessary stone to complete the building. . . .

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## EQUITABLE GAS LIGHT CO. v. BALTIMORE COAL TAR & MANUFACTURING CO.

(Court of Appeals of Maryland, 1885, 63 Md., 285.)

Alvey, C. J. . . . It is certainly a well recognized general principle by Courts of equity that they will not decree specific performance of contracts for the sale of goods and chattels, not however because of the nature of the property, the subject-matter of the contract, but because damages at law, calculated on the market price of the goods and chattels bargained for, furnish, in ordinary cases, an adequate redress to the purchaser for the breach of the bargain by the vendor. 2 Sto. Eq., sec. 717; Sullivan vs. Tuck, 1 Md. Ch. Dec., 63. But there are many exceptions to this general rule, founded principally upon the inadequacy of the remedy at law in the particular case, or the special and peculiar nature and value of the subject-matter of the contract. In the 2nd vol. of Story's Equity, sections 718 to 725, the general rule, with the exceptions thereto, will be found fully discussed, with reference to all but the very recent cases. And among the cases forming exceptions to the general rule, there is one stated of a contract for the sale of 800 tons of iron, to be paid for in a certain number of years by instalments, of which specific performance was decreed; for the reason, as supposed by the author, that, under the particular circumstances of the case, there could be no adequate compensation in damages at law; for the profits upon the contract being dependent upon future events could not be correctly estimated in an award of present damages. And so in the case put by Lord Hardwicke, in the case of Buxton vs. Lister, 3 Atk., 385, and repeated by Judge Story, as an apt illustration; a man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber, and this may be well known and understood on the part of the seller; and in such case a specific performance would seem to be indispensable to justice. And so Mr. Pomeroy in his excellent work on Specific Performance of Contracts, sec. 15, p.

20. states it as a well settled principle in the doctrine of specific performance, that a contract for the sale and delivery of chattels which are essential in specie to the plaintiff, and which the defendant can supply, while no one else can, will be specifically enforced. In such case the plaintiff could not be indemnified by any such amount of damages as he could recover at law.

In this case the allegation is that the coal tar contracted to be supplied by the defendant is indispensabe to the business of the plaintiff, and that the latter cannot otherwise obtain a supply in the City of Baltimore, and that if the defendant were permitted to withhold the supply, the plaintiff would be subjected to great additional expense and labor in procuring the material from distant cities. This gives the material a special and peculiar value to the plaintiff in Baltimore, and makes it specially inequitable in the defendant to refuse to perform its agreement. As was said by the Chancellor in Sullivan v. Tuck, supra, it would be impossible, or at all events extremely difficult, for a Court of law to give the plaintiff adequate damages, that is, to determine and measure the amount of damages which the plaintiff may sustain in the future, by the refusal to allow it to take away the material from the defendant's works, in fulfillment of the contract. The contract, therefore, according to the allegations of the bill, being one of a nature proper to be specifically enforced, the Court will interfere by injunction to restrain the defendant from otherwise disposing of the subject-matter of the contract, though the negative obligation not to otherwise dispose of the material may be only implied from the positive terms of the agreement. This principle is abundantly established by repeated decisions.

Order affirmed, and cause remanded.

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## O'NEILL v. WEBB.

(Missouri Court of Appeals, 1898, 78 Mo. App. 1.)

Ellison, J. This action is based on a bill in equity to compel defendant to transfer to plaintiff three shares of stock in the Webb City Ice & Storage Company. The trial court gave plaintiff a decree and defendant appeals. . . .

In the first place the relief sought here by plaintiff is questioned, viz: Compelling defendant to transfer to plaintiff three shares of his stock in the corporation so as to make plaintiff an owner of one half of the entire capital stock. It is contended that full relief may be had in damages. We grant that ordinarily specific performance of a contract for the transfer of corporate stock will be denied. But we think this a proper case for the relief asked. It is an exceptional case. It will be noticed that the contract contemplates not merely the transfer to defendant of three shares of stock, but that he shall transfer stock sufficient that plaintiff shall be the owner of one half of the entire stock. The words of the contract are "one half of all the stock" of the corporation.

It so happens, in this case, that added to what stock plaintiff owned and which was retransferred to him by defendant as directed by the contract, it only required the transfer of three more shares to put plaintiff into the ownership of one half of all. But the chief value would not be the money value of the three shares, but rather the power and influence it would give plaintiff in the management and direction of the corporation. By becoming owner of one half the stock plaintiff would be enabled to check any proposed management of the company's affairs which he might think was detrimental. And so it appears clear to us that this is not like a case where one should merely seek the compulsory transfer of some shares of stock, which would only have the effect of putting him into possession and ownership of such shares the loss of which might readily be made good by damages in the shape of the money value of such stock. We think, therefore, that the case is exceptional and that plaintiff has no adequate remedy at law.

We have not been able to discover any reason for interfering with the decree of the trial court and hence affirm the judgment.

All concur.

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## SHUBERT v. WOODWARD.

(United States Circuit Court of Appeals, 1909, 167 Fed. Rep. 47.)

SANBORN, C. J. The complainants pray in their bill, and the orders challenged grant, a temporary injunction against the violation by the defendants of the contract of May 4, 1908. . . .

The specific performance of a contract by a court of equity is not a matter of right. It rests in the discretion of the court, not in its arbitrary whimiscal will, but in its sound judicial discretion informed and directed by the established principles, rules, and practices of equity jurisprudence. Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109, 32 L. Ed. 500. Nor are these principles and rules and this practice hard, fast, or without exception. They are rather advisory than mandatory, and the application of the rules and of their exceptions to each particular case as it arises is still intrusted to the conscience of the chancellor. Yet these principles and rules and this practice serve to inform the intellect and to enlighten the conscience, and by them the judicial discretion of the court must be guided. . . .

The amusement company agreed by the fourth, seventh, eighteenth, and nineteenth paragraphs of the contract that it would supervise and control without charge, and that Woodward should manage for $50 per week, the Shubert Theater, subject to the orders and directions of the Shuberts, that Woodward would approve the bookings of the theater, and that its funds should be deposited to the credit of the Shuberts' account by a treasurer appointed by them. Neither the amusement company nor the court, however, has the power to efficiently compel Woodward to do any of the things here required to be done by his personal services, because he is not a party to the contract, he has not agreed to do as the contract recites, and because, if he had signed and agreed, the examination and approval of the bookings and the suitable management of the theater are personal acts whose rightful performance requires special knowledge and experience in the business of operating theaters, and the exercise of skill, discretion, and cultivated judgment, and in the end rests wholly in the will of Woodward. Courts of equity have no efficient means, and therefore will not ordinarily attempt, to constrain an individual to perform personal acts which require special knowledge and experience and the exercise of skill, discretion, and cultivated judgment. . . .

Again, the enforcement of the specific performance of the contract in hand will necessarily entail upon the courts through many years the supervision and direction of a continuous series of acts, many of which will present the question whether or not they accord with the contract, such as, what bookings should be approved or dis-

approved, how many and what persons should be employed to operate the theater, how the intricate details of the business of the theater should be conducted, how its operation should be advertised, and many other unforeseen issues which the complicated performance contemplated cannot fail to raise. It is conceded that a court of equity has ample power to determine all these questions and to conduct this business by its receiver, or master, and that it will sometimes enforce the performance of contracts where the performance involves more intricate details, or longer periods of time, where the other equities of the complainant in the case, or the public interest, are controlling. But in the absence of such public interest, or such controlling equities, or of clear evidence that irreparable injury will probably result to the complainant if it withholds the relief sought, a court of equity does not constrain, and it ought not to compel, the enforcement of the specific performance of a contract which cannot be consummated by a speedy, final decree, but which involves the supervision of a continuous series of acts which must extend through a long period of time and which will require the exercise of special knowledge, judgment, and experience. The brevity of time and the duty of the court to other litigants praying the determination of their suits ordinarily forbid a court to assume unnecessarily so burdensome a task.

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## POWELL v. SANTA FE R. R.

(Supreme Court of Missouri, 1908, 215 Mo. 339, 114 S. W. 1067.)

VALLIANT, P. J. . . . "After findings on the issues submitted to the jury had been reported, the court entered the following finding and judgment: . . .

"In our opinion this case should be determined with respect to plaintiff's equity arising from the fact that when the railroad was first built, a subway was left for his use and he constructed his barns and fences with reference to that way. It appears that he has two barns immediately north of the track and an inclosure around them where he feeds his stock. Some three hundred feet away and on the south side of the track is the spring to which the stock go from the lots about the barns to get water. To use a grade crossing,

plaintiff will be compelled to reconstruct his fences and barns or pay ten dollars a month to a hand to watch his cattle as they go through the gates and over the grade crossing to get water. This will render his farming operations more irksome and expensive and his farm less valuable. There is some testimony that he might dig a pond on the north side of the railroad; but this testimony is accompanied by the statement of the witness that the pond would soon be filled with mud. It is apparent to any one that serious inconvenience and considerable loss will be thrown on the plaintiff if he is forced to do without the undergrade way. No testimony is before us by which we can compare the expense he would be put to in changing his present arrangements with the expense of the defendant in making an arched passage through the embankment. The railway company chose not to prove what the cost of the underground passage would be, though it was easy to prove. We are, therefore, left to our own judgment about the matter, which is that the expense of constructing an arch would be much less in the long run than the expense to the plaintiff in using the grade crossing, to say nothing of the inconvenience of doing so. Now, the company's having left a subway for the plaintiff from the first, and permitted him to use it for ten or twelve years and arrange his barns and fences with reference to it, gives him a clear equity to have the continued use of it, unless the damage to the defendant will be out of proportion to the benefit to him. The testimony of defendant's witness Saunders explodes the theory that a subway will be detrimental to defendant's property or dangerous to its employees or the public. We think the cost of building it will not be inordinate. . . .

The right that a farmer has to the establishing of a crossing where a railroad divides his land, is given by statute and the statute itself seems to come naturally in response to a demand of right and justice. The statute is, to a considerable extent, general in its terms, leaving many details to be adjusted according to the particular situation and circumstances of the particular case, and this adjustment must be made by the court according to the dictates of an intelligent sense of justice, regarding the rights and duties both of the railroad company and those also of the landowner. The statute has given to neither the one nor the other the right to dictate the location or manner of construction; therefore, when the parties cannot agree, the court must exercise its best judgment and decide the controversy with due

regard to the rights of both. We think that the opinion above-herein copied shows that the Court of Appeals understood and appreciated the situation and correctly applied the law to the facts of the case; therefore, we adopt that opinion as the opinion of this court. . . .

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## HARPER v. VIRGINIAN RY. CO.

(Supreme Court of Appeals of West Virginia, 1915, 76 W. Va. 788; 86 S. E. 919.)

MILLER, J. The covenant in plaintiff's contract of September 20, 1902, and in their deed of February 23, 1903, a part of the consideration for their grant of a right of way and depot grounds to the Deepwater Railway Company, defendant's predecessor in title, and specific execution of which is sought by the bill, is as follows: "It is further agreed that said Railway Company is to erect on the land of the parties of the first part, a depot, for the general accommodation of the public. The said depot is to be built and operated within one year from the completion of said R. R." . . .

(1) The first proposition, that a court of equity will not decree specific performance of such a contract, is not one of general application. A correct statement of the rule, according to reason, and the great weight of authority is, that such contracts are not void per se and will be specifically enforced, unless to do so would be to subordinate public to private interests, or would so hamper the railway company that it would not properly discharge its duties to the public in general. . . .

(2) It is true that specific performance is not always a matter of right, and rests in the sound, not arbitrary discretion of the court; but specific performance will not be withheld when no hardship or injustice will result, and where an action at law for damages will not be adequate. We do not think the case presented here can be relievable at law as completely and adequately as by specific performance. How could the plaintiff's damages be measured? Not only is valuable property involved, but the service of the railway company to the public in general, and to plaintiffs in particular, and for an

indefinite time, not inconsistent with the public interests, is also involved. How could damages of this character be adequately measured in a court of law? Our decisions say, generally, that the remedy at law must be as adequate and complete as in equity in order to deprive one of equitable relief. . . .

We are of opinion that the decree should be so modified as to continue the same in force so long and so long only as consistently with defendant's duties to the public in general, and compliance therewith shall not have become unduly burdensome and unjust, and the defendant may reasonably be required to maintain and operate the depot at Harper, and that when in accordance with these principles it can no longer reasonably be required to continue the maintenance and operation of said depot, the coercive power of the court may be withdrawn and the parties left to the pursuit of such legal remedies as they may then have. . . .

As so modified we are of opinion, therefore, to affirm the decree.

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## WESTERN WAGON AND PROPERTY CO. v. WEST.

(Supreme Court of Judicature (1892) 1 Chancery Division, 271.)

Chitty, J. . . . The Plaintiffs are the assignees for value of the benefit of a contract to make a loan of money at interest upon security. Having given notice of their assignment, they claim to recover from the defendants the £500 which the defendants lent and paid to Pinfold under the contract. . . . A Court of Equity will not decree specific performance of a contract to make or take a loan of money, whether the loan is to be on security or not. This was decided by Sir John Romilly in Rogers v. Challis (1), and Sichel v. Mosenthal (2), and these decisions were approved of by the Privy Council in Larios v. Bonany y Gurety (3). In other words, a Court of Equity will not compel the intended lender to make, or the intended borrower to take the loan, but will leave the parties to such a contract to their remedies by action at common law for damages. It

(1) 27 Beav. 175.
(2) 30 Beav 371.
(3) L. R. 5 P. C. 346.

follows, then, that Pinfold could not have maintained a suit in equity against the defendants to compel them to lend the £500, and that, inasmuch as the plaintiff's as assigns of Pinfold, are in no better position than Pinfold himself, the plaintiffs cannot maintain such a suit.

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## STROHMAIER v. ZEPPENFELD.

(Missouri Court of Appeals, 1877, 3 Mo. App. 429.)

Hayden, J. This is a bill in the nature of a bill in equity, asking that the defendant may be compelled to execute a renewal of a lease. A former owner of the leased lot had leased it to the respondent for a term of ten years, and in the lease was the following covenant: "And it is covenanted and agreed by and between the said parties that, at the end of the term hereby demised, this lease shall be renewable for the further term of ten years, provided that the party of the second part giving [give] to the party of the first part notice in writing of his or their wish to renew the same, three months at least before the end of the term. And the lease so renewed shall contain all the covenants, agreements, clauses, and stipulations herein containd, with this exception only: The annual rents to be reserved on the renewal shall be six per centum upon the value of the demised premises, exclusive only of the improvements thereon placed by said lessee, or his legal representatives, if any, which value shall be estimated by two disinterested freeholders of the city of St. Louis, one of whom shall be selected by the party of the first part and the other by the party of the second part," etc. . . .

It is well settled that a court of equity will not specifically enforce a contract for arbitration. Where arbitrators are to act, the court will neither compel their appointment, nor, when they are appointed, will the court compel them to act. Agar v. Macklew, 2 Sim. & Stu. 418; Milnes v. Gery, 14 Ves. Jr. 400; Story's Eq. Jur., sec. 1457. But where, as in the present case, the parties have by a written contract definitely agreed upon all the substantial terms, equity will not permit one of them to set up his own wrong as a defense to the nonperformance of the contract, and thereby to keep possession of the

property which the first party has laid out in the expectation that the contract would be performed. In such a case, when the defendant refuses to comply with his contract, he subjects himself to the operation of those remedies which courts of equity afford. Having broken the contract himself, it does not lie in his mouth to say the contract cannot be performed because it provides that one element in ascertaining the rent is a valuation by persons to be selected by the parties. The answer to this is that, as the owner of the ground reruses to perform the contract precisely as made, and thereby works a wrong to the lessee, for which the latter has no adequate legal remedy, a court of equity, to prevent a failure of justice, applies its own remedy to the breach of contract. In such cases a court of equity does not proceed upon the basis of enforcing the contract exactly as made by the parties, but upon the theory that, while in all important respects the contract can be specifically performed as the parties made it, in some minor matter where, through the wrong of the party resisting, it cannot be exactly enforced, equity, in pursuance of its principle of substituting compensation for performance, where it is necessary in order to attain the ends of substantial justice, will apply its own remedies to the wrong, and thus secure that which, in essentials, is a performance. The real difficulty lies in deciding what contracts are so uncertain that equity will not apply this rule of compensation to them. On the one hand, equity cannot make contracts for the parties; on the other, it will not let the defendant escape the consequences of his obligation where only some insignificant detail is in doubt. While the rule itself is admitted, there is a conflict, in the older authorities, as to what terms are of the essence of a contract. . . . In Hall v. Warren, 9 Ves. Jr. 605, where the valuation was to be by appraisers appointed by the parties, the master of the rolls, Sir William Grant, said: "Nothing appears in the acts to be done so purely personal that they cannot be supplied without the intervention of the mind and the act of the party; for they are to be done with reference to a given mode; and, with regard to ascertaining the value, a mode equivalent and as effectual and fair may be found." Whatever may be said as to the older cases, this appears to be an accurate expression of the principle upon which the more recent cases have proceeded. In Judson v. Judson, 19 Eng. Law & Eq. 547, where the contract provided that each party should appoint a valuer, and the valuers appointed could not agree, and the vendor

then refused to join in any scheme for a valuation, the court decreed specific performance. The vice-chancellor said: "The sixth condition stated that the purchaser should take the property at a valuation, the essence of the stipulation not appearing to be the mode in which the valuation was to be made." Dunnell v. Ketaltas, 16 Abb. Pr. 205; Kelso v. Kelly, 1 Daly, 419, where the authorities are reviewed with much care. It seems clearly the doctrine of the later cases that equity will, to prevent a failure of justice, apply its own remedies, and thus, where the substantial terms of a contract are agreed upon, arrive approximately at the minor details and then specifically enforce the contract. Parker v. Taswell, 2 De G. & J. 559; Norris v. Jackson, 3 Gif. 396; Backus' Appeal, 58 Pa. St. 186, 193. This rule has an *a-fortiori* application where there is a part performance, or where the party seeking to enforce the contract has laid out money or property in the faith that the other party will keep his covenants.

It would be peculiarly hard if relief should be denied to the plaintiff in the present case. Since the decision of the Supreme Court of this state in the case of Arnot v. Alexander, 44 Mo. 25, persons taking leases with covenants similar to that in the present lease have had, in some sort, a right to expect that courts of equity in this state will enforce them. The clause drawn in question in that case is not, indeed, precisely similar to the one here in dispute. But the court argued from the certainty of a covenant of the present kind to the covenant there in question. Stating it as an established proposition that a court of equity would hear evidence and fix the amount of the rent, in a case where the amount for the renewal term is left to be determined by the valuation of third parties, the Supreme Court, passing over the later cases from Vesey, Jr., presented to its consideration, sanctioned the doctrine of Sir William Grant in Hall v. Warren, which has been quoted above. Wherever a rule is laid down which may operate as a rule of property, the courts ought not to depart from that rule without very strong reasons. It is believed that there are many leases with covenants similar to that contained in the present.

The cases of Biddle v. Ramsey, 52 Mo. 153, and Hug v. Van Burkleo, 58 Mo. 202, are not in conflict with the recent cases which we have cited. As has been shown, a court of equity does not enforce the contract as made by the parties, in such cases as the present. On the contrary, equity proceeds upon the basis that the contract,

as made, cannot be enforced, and applies its own remedies to the violation of its rules. The relief given is of a purely equitable nature, and the ground on which the plaintiff is entitled to it is that, while he has a clear right of action, he has no adequate remedy at law. In the case of a covenant like that now in question, it is obvious that it is not of the essence of the contract that the valuation should be made by "disinterested freeholders" rather than by a court of equity. That is an immaterial detail, and a mode as effectual and fair may be found. Accordingly, the court should hear evidence, and upon the case as made, and upon the facts as ascertained from the evidence, specific performance may be decreed.

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## SECTION III. NEGATIVE CONTRACTS.

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### GUARD v. WHITESIDE.

(Supreme Court of Illinois, 1851, 13 Ill. 7.)

This was an action of debt brought in the Circuit Court of Hardin County, upon an injunction bond. The appellants filed a plea in bar, stating that on the 10th day of April, 1851, it was agreed between the parties to the suit that if the appellants would give the appellee a horse worth seventy-five dollars he would not bring suit on the bond until the 25th of December, 1851; that the horse was delivered in pursuance of this agreement. To which plea there was a demurrer, which was sustained. . . .

TREAT, C. J. The defendants pleaded in bar of the action, that, before the commencement thereof, the plaintiff agreed with one of them to forbear the collection of the bond until the 25th of December, 1851, if said defendant would pay and deliver a certain horse at the price of $75, which horse was then delivered. The agreement relied on in the plea must be considered as an undertaking by the plaintiff not to sue on the obligation within a specified time. A covenant never to sue is regarded as an absolute release. It is so held to avoid circuity of action; for if the covenantor should be permitted

to sue in violation of his covenant and recover, the other party, in an action for a breach of the covenant, would recover precisely the same damages. But a covenant not to sue within a limited time cannot be pleaded in bar of an action brought before the time has expired (Evans v. Lohr, 2 Scam. R., 511; Payne v. Weible, 30 Ill. R., 166; as part failure of consideration, Hill v. Enders, 19 Ill. 165; Morgan v. Fallenstein, 27 Ill. R., 32; Parmelee v. Lawrence, 44 Ill. R., 405). The remedy of the party is a direct action on the covenant. The law on this subject is too well established to admit of a doubt or discussion. It is only necessary to refer to some of the principal authorities. Thimbleby v. Barron, 3 Mees. & Wels, 210; Winans v. Huston, 6 Wend. 471; Perkins v. Gilman, 8 Pick. 229; Walker v. McCulloch, 4 Greenl. 421; Ward v. Johns, 6 Munf. 6; Lane v. Owings, 3 Bibb, 247. There is a very satisfactory reason why a plea in bar of the action should not be sustained. A judgment for the defendant, on such a plea, would forever conclude the plaintiff from bringing another action. There would seem to be a propriety in allowing a defendant to set up the covenant as a defense to the further maintenance of an action brought in violation thereof—such a defense as would defeat the particular action, without concluding the plaintiff from bringing another after the time limited had expired. But we must be understood as expressing no opinion upon the question, whether the rules of the law will tolerate a defense of this character.

The judgment is affirmed.

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## JACKSON v. BYRNES.

(Supreme Court of Tennessee, 1899, 103 Tenn. (19 Pickle) 698, 54 S. W. 984.)

Wilkes, J. Jackson sold to Byrnes a livery stable and outfit for $1,500, situated in the town of Cedar Hill, Robertson County. The purchaser insists that as a part consideration for the contract, Jackson agreed that he would not engage in the same business at that place so long as he, the purchaser, continued in the business.

The contention is that he breached this agreement by letting horses and wagons to hire. The plaintiff sued for this breach, and there was a trial before the court and a jury, and a verdict and judgment for $400, and defendant has appealed and assigned errors.

As the first assignment of error, it is said that such contract is contrary to public policy, and should not be enforced.

In this connection it is said there is a variance between the allegation in the declaration and the evidence; that the declaration alleges that the defendant was obligated not to enter into the business at Cedar Hill, while the evidence was to the effect that he would not enter into the business anywhere. We think this contention not well made, and taking the evidence as a whole, it clearly appears that Cedar Hill was the place of the location of the business, and that the contract did not relate to doing business anywhere else. We do not think such an agreement is so opposed to public policy as to be void. Such contracts have been upheld and enforced by the courts. Beach on Modern Law of Contracts, Vol. 2, Sec. 1569; Clark on Contract, pages 448, 449.

It is well to remark in this connection that the case is not simply one of a sale of good will. A sale merely of good will does not, of itself, imply a contract on the part of the vendor to not engage again in a similar business.

Lord Eldon defined "good will" as simply a possibility that the old customers would resort to the old place. But this definition is, perhaps, too restricted. Slack v. Suddoth, 102 Tenn. 375.

Suffice it to say that an obligation not to enter into a similar business will not be implied from a mere sale and transfer of good will, and the present is not such a case, but one where there was an express parol agreement collateral with the conveyance of the property, but not embodied in it, not to enter into competition in the same business and territory as the plaintiff did business in so long as he continued in it.

The next assignment is as to the measure of damages. The court charged the jury that the proper measure was the difference in value of the property with the good will and without competition of the defendant, and the value of the property without the good will and with the competition of the defendant. In the same connection the trial Judge instructed the jury that they must look to the evidence and see if there was any competition, and its character and extent, whether full or slight, and the extent to which the property was depreciated from the purchase price as agreed on and as shown by the proof, as the damages plaintiff would be entitled to recover. We do not understand the trial judge to mean that a single act of com-

petition would be a breach of the contract, and he did not intend to lay down two rules, but only to instruct the jury as to how they should arrive at the difference in value with and without the competition. But it is said the rule itself is erroneous, and that the proper rule is that the plaintiff can only recover such actual damages and loss as he may be able to show up to the bringing of the suit. Authorities are cited upon both theories. . . .

The court is of opinion that in a case like the present, and under the facts, the plaintiff's proper remedy is to enjoin the defendant from engaging in the competitive business contrary to the agreement.

This would, so far as results go, be to specifically enforce the contract. If, however, the plaintiff resort to an action for damages for a breach, only such actual damages as have been sustained up to the bringing of the suit should be recovered. If the competition is continued, injunction may also be resorted to.

It is practically impossible to determine the difference in value of the property or contract with and without the proviso against competition. No witness could know, and the plaintiff himself could not state how long he would continue in business, and, in the absence of this fact, there could be no tangible basis for an estimate of damages.

No sum is fixed in this case as liquidated damages, and there is no allegation that any specific amount was given for this prohibition, but the statement is simply to the effect that it was a part of the consideration.

For these reasons we are of opinion there is error in the judgment of the court below, and it is reversed and the cause remanded. Appellee will pay costs of appeal.

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## PEABODY v. NORFOLK.

(Supreme Court of Massachusetts, 1868, 98 Mass. 452.)

GRAY, J. It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as

property. If he adopts and publicly uses a trade-mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and thus affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.

In the earliest reported case of this class, Lord Eldon indeed refused to grant an injunction against imparting, in violation of an agreement, the secret, not only of a patent which had been obtained and had expired, and which the whole public was therefore entitled to use; but also that of making a certain kind of pills, for which no patent had been procured; and stated, as a reason for the latter, that, if the art and method of preparing them was a secret, the court could not, without having it disclosed, ascertain whether it had been infringed. Newberry v. James, 2 Meriv. 446. But the same learned chancellor afterwards considered the general question as still an open one, whether a court of equity would restrain a party from divulging a secret in medicine, which was not protected by patent, but which he had promised to keep; and in such a case dissolved an injunction of the vice-chancellor, upon the sole ground that the defendant made affidavit that the secret was not derived from the plaintiff. Williams v. Williams, 3 Meriv. 157. And in a later case he unhesitatingly granted an injunction against one who by the terms of his agreement with the plaintiff was not to be instructed in the secret, and who had obtained a knowledge of it by a breach of trust. Yovatt v. Winyard, 1 Jac. & Walk. 394.

Sir John Leach decreed, in one case, specific performance of an agreement by a trader to sell the good will of a business and the exclusive use of a secret in dyeing; and, in another, an account of the profits of a secret for making a medicine against a son of the inventor, holding it in trust for his brothers and sisters. Bryson v. Whitehead, 1 Sim. & Stu. 74; Green v. Folgham, Ib. 398.

In a more recent case, Morison, the inventor and sole proprietor of a medicine, for which no patent had been obtained, entered into partnership with Moat, to whom he communicated the secret of making the medicine, but did not make the secret a part of the assets of the partnership, and reserved it to himself as against all other persons, and Moat covenanted not to reveal it to any person whomsoever; by subsequent agreement Morison's sons and a son of Moat were admitted as partners in the business; and the secret was surreptitiously obtained from Moat by his son. After the death of both the original parties, on a bill brought by Morison's sons, who were also legatees of the secret, against Moat's son, Vice-Chancellor Turner, in an elaborate judgment reviewing all the English authorities, granted an injunction restraining the defendant from using the secret in any manner in compounding the medicine; and refused to restrain him from communicating the secret, simply for want of any allegation or evidence of an intention to communicate it. Morison v. Moat, 9 Hare, 241. The defendant appealed; but the order was affirmed; and Lord Cranworth, delivering the opinion of the court of appeal, said: "The principles that were argued in this case are principles really not to be called in controversy. There is no doubt whatever, that when a party who has a secret in trade employs persons under a contract express or implied, or under duty express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer." 21 L. J. (N. S.) Ch. 248. . . .

The contract between Peabody and Norfolk was, on the part of Norfolk, to serve Peabody as engineer in his jute factory so far as required, and particularly in the construction and running of the machinery, and not to give any third person information directly or indirectly in regard to any portion of the machinery, but to "consider all of said machinery as sacred to be used only for the benefit of said Peabody or his assigns, and by all means in his power prevent other persons from obtaining any information in regard to it such

as would enable them to use it;" and, on the part of Peabody, to pay Norfolk an annual salary "in full compensation for the above described services," provided he should render his services acceptable to Peabody as he had theretofore, and Peabody or his assigns should continue the business of manufacturing jute goods. The "above described services" clearly include, not only the affirmative promise to serve as an engineer, but the negative promise not to disclose the secret, and to do his best to conceal it; and the salary is a legal and sufficient consideration for all the agreements of Norfolk.

The plaintiffs do not ask for specific performance of Norfolk's promise to serve as engineer. It is therefore unnecessary to consider whether that promise is limited in point of time or determinable at pleasure, or is capable of being specifically enforced. Whatever may be the limit or effect of his obligation to serve, he is bound by his contract never to disclose the secret confidentially imparted to him during the term of his actual service. And this part of his agreement may be specifically enforced in equity, even if the other part could not. Lumley v. Wagner, 1 De Gex, Macn. & Gord. 604.

The bill alleges that the invention and the process of manufacture have been kept secret, and that the secret is the property of the original plaintiff and of great value to him, and was confidentially imparted to Norfolk; and on demurrer these allegations must be taken to be true. Although the process is carried on in a large factory, the workmen may not understand or be intrusted with the secret, or may have acquired a knowledge of it upon the like confidence. A secret of trade or manufacture does not lose its character by being confidentially disclosed to agents or servants, without whose assistance it could not be made of any value. Even if, as is argued in support of the demurrer, the process is liable to be inspected by the assessor of internal revenue or other public officer, the owner is not the less entitled to protection against those who in, or with knowledge of violation of contract and breach of confidence, undertake to disclose it or to reap the benefit of it. The danger of divulging the secret in the course of a judicial investigation affords in our opinion no satisfactory reason why a court of equity should refuse all remedy against the wrongdoers.

The supplemental bill alleges, and the demurrer admits, that Cook, with notice of the relations between Peabody and Norfolk, has made arrangements to have the secret communicated to him by Norfolk,

and together with him to use it for their own benefit. Upon such a state of facts, Cook has no better equity than Norfolk.

The executors of the will of the original plaintiff succeed to his rights, and appear on the allegations of the bills to be entitled to the relief prayed for. Morison v. Moat, above cited.

Demurrer overruled.

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## DALY v. SMITH

(New York Superior Court, 1874, 38 N. Y. Sup. Ct. Rep. 158.)

FREEDMAN, J. This is a motion on the part of the plaintiff for the continuance, during the pendency of the action, of an injunction, heretofore granted, preliminarily restraining the defendant, Fanny Morant Smith, from performing as an actress upon the stage of the Union Square Theater.

The papers on which the motion is based show, among other things, that on February 11, 1874, a contract in writing was entered into between the plaintiff and Fanny Morant Smith, by which the latter covenanted and agreed, among other things, to act, to the best of her ability, in theatrical performances, on the stage of plaintiff's theater, during the seasons of 1874, 1875, and 1876, all such parts and characters as the plaintiff might direct, and that she would not act at any other theater or place in the city of New York, from the day of the date of said contract until the determination thereof, without the written consent of the plaintiff. The plaintiff then avers a breach of said contract on her part, by accepting an engagement to play during the ensuing season of the Union Square Theater, and allowing her appearance at that place to be publicly advertised, and after setting forth various alleged equities, which it is claimed, on his part, entitled him to an injunction, and which will be noticed hereafter, he prays that she may be enjoined from continuing the breach. The sole object of the action, in which her husband has been joined as a party defendant, is to have her thus restrained by the decree of this court, and it is clear, therefore, that unless an action for that purpose alone can be maintained, the court is without jurisdiction to restrain her during the pendency thereof.

The very first question to be considered, therefore, is whether the action will lie as brought. It is conceded, by both sides, that the action could not be maintained for the strict performance of the whole contract, if it had been brought in that form, that in such case there would be no power in the court to compel, either by order or final decree, the defendant to act.

The question, whether or not a court of equity will interfere by injunction to prevent a breach of a contract for personal services, or whether the complainant must look to his damages at law as his sole redress, has been frequently, and on several occasions quite elaborately, discussed both in England and in this country. On a cursory reading the authorities may seem somewhat conflicting, but a careful perusal of them in the light of the facts before the court on the several occasions, can leave no doubt as to the existence of the power. . . .

In the still later case of Lumley v. Wagner (1 De Gex, MacN. & G. Ch. 604), decided in 1852, in which the plaintiff prayed that the defendant Johanna Wagner, who had contracted to sing and perform at his theater, and not to use her talents at any other, might be restrained from signing or performing at another theater in violation of her contract. The Lord Chancellor re-examined the jurisdictional question involved at great length, upon both principle and authority, discussing and reviewing many cases, and he concluded by saying that he wished it to be distinctly understood that he entertained no doubt whatever, that the point of law had been properly decided in the court below, where the jurisdiction had been assumed and exercised. He also entered into a minute examination of the facts of the case, and upheld the injunction on the merits as well as on the point of law raised. In the course of his remarks, he expressly overruled Kemble v. Kean, and Kimberly v. Jennings.

The criticism of Lumley v. Wagner, in which Lord Selborne, L. C., indulged in Wolverhampton & Walsall Railway Co. v. London & Northwestern R. R. Co. (decided in 1873, and reported in 16 L. R. Equity Cases, 433), is not an indication that the existence of the power contended for will ever be questioned by the courts of England, hereafter. In that case, the complainants sought by means of an injunction to indirectly compel the defendant to use a certain railway line as they had agreed. The defendants insisted that as the bill sought to restrain the breach of a particular clause of an agreement of which as a whole, the court will not enforce specific performance, and there

being no negative stipulation in the agreement, capable of being isolated, so as to form a distinct contract, as in Lumley v. Wagner, the court could not interfere, but should leave the parties to their remedy at law. It was in reply to this claim which involved a concession of the existence of the jurisdiction in case of the presence of a negative clause, that Lord Selborne, assuming that in Lumley v. Wagner, the Lord Chancellor had placed his decision solely upon the presence of the negative clause, made the remark that in that case the jurisdiction of the court had been enlarged on a highly artificial and technical ground, and that it was the safer and the better rule to look in all such cases to the substance and not to the form. "If," said he, "the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the court to come to for a remedy. If it is, I can not think that ought to depend on the use of a negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such, that the remedy ought to be sought elsewhere, then I do not think that the forum ought to be changed by the use of a negative rather than an affirmative. "Acting upon the rule thus laid down, and coming to the conclusion that the complainants had a substantial equity, Lord Selborne assumed jurisdiction, though there was no negative clause, and overruled defendants demurrer to the complaint. . . .

The authorities so far considered show conclusively that in England, at least, the jurisdiction of courts of equity over suits like the one at bar, is now too firmly established to be again shaken. Nor has such jurisdiction been seriously questioned in this State. . . .

And in the recent case of DePol v. Sohlke (7 Rob. 280), Mr. Justice Jones assumed throughout that the right to issue an injunction to prevent the breach of a covenant to render personal services, on the ground that the performance of the act would produce irreparable damages, could not well be questioned. But he denied the motion for an injunction on the ground that the plaintiffs did not then have, and were not likely to have for some time to come, an establishment in active operation, that, therefore, no custom could, for the time being, be withdrawn from them, and that consequently, no damages were resulting, or could be anticipated to result, for some time to come, from the act which plaintiffs sought to enjoin.

So, upon principle, can I conceive of no reason why contracts for theatrical performances should stand upon a different footing than

other contracts involving the exercise of intellectual faculties; why actors and actresses should by the law of contracts, be treated as a specially privileged class, or why theatrical managers who have to rely upon their contracts with performers of attractive talents to carry on the business of their theaters, should, with the large capital necessarily involved in their business, be left completely at the mercy of their performers. On the contrary, I am of the opinion that actors and actresses, like all other persons, should be held to a true and faithful performance of their engagements, and that whenever the court has not proper jurisdiction to enforce the whole engagement, it should, like in all other cases, operate to bind their consciences, at least as far as they can be bound, to a true and faithful performance. As pointed out by Judge J. F. Daly, in Hayes v. Willio (11 Abb. Pr. N. S. 167), and his remarks upon this point are entitled to respect, notwithstanding the fact that his decision has been reversed upon another point, the resort to actions at law for damages for a sudden desertion of the performers in the middle of their season, will, in most cases fail to afford adequate compensation; and it is not always that the manager is deprived of his means of carrying on his business, but that his performers, by carrying their services to other establishments, deprive him of the fruits of his diligence and enterprise, increase the rivalry against him, and cause him irreparable injury. If, therefore, such a manager comes to a court of equity and makes proof of these facts and circumstances, showing, also, that the contract upon which he relies is a reasonable one, that he is in no wise to blame for its breach by the defendant, and that he has no adequate remedy at law, upon what principle of justice or of common sense is he to be told that he must, nevertheless, seek his remedy at law, and take the chance by proving his damages by legal evidence before a jury. Of what benefit would even a verdict be to him in case the defendant is wholly insolvent? Is it not an old and fairly settled principle of equity jurisprudence, that just because there is in such a case no adequate remedy at law, it is the office and the duty of equity to step in to prevent a failure of justice? In the language of Lord Chancellor St. Leonards, a judge would desert his duty who did not act up to what his predecessors have handed down as the rule for his guidance in the administration of such an equity.

Suffice it, therefore, to say, that upon principle as well as upon authority, I am fully persuaded that this court does possess the power

and jurisdiction which has been invoked by the plaintiff. At the same time, I am well aware that there is no branch of equitable jurisdiction which requires more discretion in the exercise of it, than the one that has been here considered. It remains, therefore, to be seen whether the plaintiff shall have the benefit of it on the merits of his case.

The plaintiff shows that the defendant, Fanny Morant Smith, is a distinguished actress and a great artistic acquisition, both in name and dramatic service, to any theater; that, therefore, for several seasons past he considered it important to secure her professional services for his theater, and did secure them, that the last contract for such seasons expired in the month of June last; that before the expiration of that contract, to wit, on the 11th of February last, the new contract was entered into under which the present controversy has arisen; that the last named contract covers the seasons of 1874, 1875 and 1876, each season to commence on or about September 1 of each respective year, and to terminate on or about June 15 of the following year, and that by it Fanny Morant Smith, in consideration of a weekly salary of one hundred and thirty dollars, to be paid to her during the first season, and a like salary of one hundred and thirty-five dollars to be paid to her during the second and third seasons, payment to be made on Monday, at noon, of each week, bound herself to act, to the best of her ability, in the performances to be given during the said seasons, all such parts and characters as the plaintiff might direct, and to conform to and faithfully obey certain rules of plaintiff's theater, referred to in, and made part of said contract, and not to act at any other theater in the city of New York, from the date of said contract until the determination thereof, without the written consent of the plaintiff. The contract also shows that each week is to include such rehearsals as may be ordered by the plaintiff, without any extra payment therefor. The plaintiff further shows that he made such contract, as the defendant Fanny Morant Smith well understood at the time, because of his desire, first to secure her dramatic service, secondly her name, and thirdly to prevent her acting elsewhere in New York without his permission, and obtaining *eclat* for a rival theater; that the latter is always an essential reason with managers, and is well understood by every actor and actress, as it was understood by the defendant; that relying on said contract, he announced her in all the daily papers in the city of New York, and widely throughout the United States, as a

member of his company for this year's season, to commence August 25; that a rehearsal for the performance to be given on that day was ordered for Saturday, August 15, that she was notified to attend the same, but that she refused; that he has substantially selected and prepared those plays which are to be presented up to the close of the said season, and in doing so has relied on her services, and has managerially distributed and prepared many parts for her to perform therein; but that in violation of her contract and against plaintiff's express prohibition, she entered into an engagement to play during the ensuing season at the Union Square Theater, a rival to plaintiff's theater, and that with her consent she is publicly announced to appear there. And finally the plaintiff shows that it will be impossible to replace her by any other artist at this date, inasmuch as engagements are made in the spring; that he will therefore be irreparably damaged and injured in his business, not only by her departure, but also by her appearance and performance at the rival establishment and that a computation of the damage thus resulting to him in loss of receipts and otherwise will be utterly impossible in an action at law.

None of these allegations have been denied, or attempted to be denied, by the defendant, Fanny Morant Smith, except the allegation that the plaintiff has selected parts for her, and in respect to that, she only avers generally, that she has no knowledge, and does not believe the fact to be as stated by the plaintiff, which can not be held to amount to a denial, especially as she admits to have been summoned to a rehearsal, and to have refused not only to attend, but even to look at the *rôle* assigned to her. Nor has the force of any of the said allegations of the plaintiff been weakened by any allegation on her part, unless it be by the allegations that she notified the plaintiff, some time after the execution of the contract, of her intention and desire to cancel the same, and that she is pecuniarily able, to the extent of twenty thousand dollars, in real estate, to respond in any damages he may recover against her at law. Upon the whole case, as made by the plaintiff, the facts thus averred by her, even if true, are quite unimportant. So, when the contract is scrutinized in its entirety, and with due regard to its nature and the situation, and the prior dealings of the parties, nothing can be found in it which could be construed into a hardship upon her. Even the fact that the prohibition runs from the date of the contract, and not from the commencement of the

regular season of 1874-1875, is not an unreasonable circumstance in this case, however unreasonable and inequitable it might be in others. It has been conceded by both sides, that the defendant, Fanny Morant Smith, is not only a great actress, but that she is also a shrewd lady of great business capacity, and mature age and judgment, and it is therefore safe to assume that, in the light of her past experience with the plaintiff, she made the best bargain for herself that could be got under the circumstances. Nor does she claim that the contract is void on grounds of public policy, as being in restraint of trade. On the contrary, the learned counsel who represents her, admits that such is not the fact.

The plaintiff has, therefore, made a case as strong as Lumley v. Wagner, in all respects, and in some respects even stronger, and he is entitled to his injunction, unless the defendant, Fanny Morant Smith, establishes an affirmative defense. . . .

Upon full consideration of all the questions arising in this case, as presented by the affidavits of the parties, I am entirely satisfied, not only, that the plaintiff has made out a case which calls strongly for the interposition of the equity powers of this court, but also that the defendant, Fanny Morant Smith has no defense on the merits. This brings me to the last question involved. The parties evidently foresaw that differences might arise between them during the life of the contract, and so careful were they, that they provided even for the contingency which has arisen in this case. The contract says, that if the defendant, Fanny Morant Smith, should refuse to fulfill her part, and should attempt to perform at any other theater before the termination of her agreement with the plaintiff, the plaintiff may by legal process or otherwise, restrain her from so performing, on payment to her during such restraint of a sum equal to one-quarter of the salary to be paid to her under the contract in lieu of the said, or any other, salary under the agreement during the period covered. I refrained from noticing this clause at an earlier stage, because parties can not confer jurisdiction by stipulation. But as the jurisdiction exists, as I have already shown, wholly irrespective of the clause, it was competent for the parties to agree upon the terms of restraint in a proper case, and as this is a proper case for an injunction, irrespective of said clause, I have no inclination to interfere with the arrangement which the parties saw fit to make. The plaintiff evidently considered that, though in case of disagreement, he could not compel the defendant,

Fanny Morant Smith to act, it was worth about thirty-three dollars a week to him to keep her from constituting an attraction for a rival establishment, and she, having agreed to it, has no cause of complaint, for her restraint is not predicated by the court upon the existence of the clause. By the terms of the contract, restraint and payment are mutually dependent on each other, and the restraint is not to extend beyond the limits of the city of New York, and a contract to this effect is therefore presented, which the court can completely and effectually enforce. No previous payment or tender is necessary to the maintenance of the action.

The motion of the plaintiff for the continuance of the injunction during the pendency of the action, is therefore granted, with ten dollars costs, but on condition that the plaintiff pay to the defendant, Fanny Morant Smith, during such continuance, one-quarter of the salary to which she would be entitled under the contract in case of performance, such payment to be made to her, or her order, as she may direct, in weekly installments, payable on Monday of each week, and that he also pay to her or her order, forthwith, such sum as may have accrued since the granting of the preliminary injunction contained in the order to show cause herein.

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## KIRCHNER & CO. v. GRUBAN.

(Supreme Court of Judicature, (1901) 1 Ch. Div. 413.)

Eve, J. It is admitted, or conceded, I think I may say, by counsel for the plaintiffs that if this were a mere affirmative agreement by the defendant to serve the plaintiffs until July 1, 1910, and he had refused to continue that service, the Court would not according to the well-settled practice, interfere by an injunction to compel him to render his services to the plaintiffs down to the date at which in the ordinary course the engagement of service would come to an end. But it is urged here that it is not merely an affirmative covenant, but that there is in this document a negative stipulation which the Court, according to the practice, can enforce by restraining the defendant in the terms of the covenant. The negative stipulation is to be found

in clause 7 of the agreement. "Mr. Gruben"—that is the defendant—" agrees under a penalty of 20,000 marks to remain in his position and not to give notice before July 1, 1910."

Now it is said that what he has done is a breach of his agreement not to terminate the service before July 1, 1910, and if the matter were entirely free from authority that would be an argument to which I think I should have had to give very much more weight than I am able to do in the present state of the authorities. The question as to the practice of the Court to enforce affirmative covenants of this sort was dealt with and finally disposed of, at any rate for the present, by the case of Whitwood Chemical Co. v. Hardman (1891) 2 Ch. 416, and at a later date the principle upon which that and similar cases had been determined came up for consideration before the late Kekewich J. in the case to which I am about to refer, the case of Davis v. Foreman (1894) 3 Ch. 654, 655, 657. There the form of the agreement between the employer and the employed was this: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15, each and every month." There was an agreement in the negative by the employer that so long as a certain state of things continued to exist he would not give notice to the employee determining the engagement. Kekewich, J., having heard all that was to be said on behalf of the plaintiff, who in that case was the employee seeking to restrain the employer from acting upon the notice, gave his judgment, in which he arrives at this conclusion, that though in form the stipulation or agreement is negative, in substance it is really affirmative and positive, that an agreement not to give notice to determine his employment is for all practical purposes an agreement to continue the employment, and having come to that conclusion he says: "Having regard to the principle expounded by the Court of Appeal in Whitwood Chemical Co. v. Hardman (1891) 2 Ch. 416, and recognized again in the case of Ryan v. Mutual Tontine Westminster Chambers Association (1893) 1 Ch. 116, which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words,

give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the Court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of Lumley v. Wagner (1852) 1 D. M. & G. 604, which is not to be extended, to a case of this character."

It seems to me that every word of that judgment is applicable to the present case, and that I should be disregarding an authority which is certainly binding upon me if I were to hold that merely because Mr. Gruban has entered into a contract not to terminate the engagement before July 1, 1910, I could grant an injunction the effect of which would be as against him to order specific performance of an agreement to continue to serve the plaintiffs down to July 1, 1910. So that on the first part of the motion I hold that, apart from all other considerations, the plaintiffs would not be entitled to the order for which they ask. . . .

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## DOCKSTADER v. REED.

(Supreme Court, Appellate Division, New York, 1907. 121 N. Y. App. Div. 846; 106 N. Y. Supp. 795.)

HOUGHTON, J. The plaintiff is the proprietor of a minstrel troupe, and on the 19th day of March, 1907, the defendant contracted by written agreement with him at a stipulated salary per week to sing and play until the end of the season of 1909. The defendant entered upon his employment and continued until September, 1907, when he abandoned his contract, claiming that his health was such that he could not continue singing and traveling about the country and parading the streets in inclement weather. The record contains an affidavit by his physician that to continue in such work and expose himself to varying climate throughout the country would greatly endanger defendant's

health which is not robust. The part to which defendant was cast in plaintiff's troupe was a bass singer in a quartet, rendering several songs during the performance. The court granted an injunction during the pendency of the action, restraining the defendant from rendering any services to any other person than the plaintiff or giving any theatrical performance in public as an actor.

The contract which the defendant signed is the usual unique one which theatrical managers often demand from actors which they employ, and in it the defendant confessed that the services which he was to render were "special, unique, and extraordinary," and admitted that he could not be replaced, and agreed that in the event of its breach the plaintiff would suffer irreparable injury, which could not be ascertained or estimated in an action at law, and consented that an injunction might be issued against him restraining him from rendering services for any other person. This confession and defendant's own estimate of himself is the only proof in the case that his services were unique and that he could not be replaced. The contract gave the plaintiff the right to discharge the defendant, without recourse, if his services were unsatisfactory, and also the absolute right of discharge, without cause, upon two week's notice; and it is quite improbable that a bass singer in a minstrel quartet cannot be found to take defendant's place. Notwithstanding the agreement of the defendant, we think the facts did not warrant the granting of an injunction. Parties to an agreement cannot contract that courts will exercise their functions against or in favor of themselves. Whether or not a court will so exercise its powers is for the court itself to determine.

While equity will often restrain an actor under contract to perform for one and not to perform for another, or from performing for another during the period of the contract, an application for equitable relief is addressed to the sound discretion of the court, and will not be granted where the party seeking relief is not specifically bound by the contract, so that the obligations are reciprocal and enforceable. Lawrence v. Dixey, 119 App. Div. 295, 104 N. Y. Supp. 516. Whether equity will intervene to restrain by injunction the violation of a restrictive covenant in relation to personal services depends in large measure upon whether a substitute for the employee can readily be obtained, and whether such substitute will substantially answer the purpose of the contract. Strowbridge Lith. Co. v. Crane, 58 Hun,

611, 12 N. Y. Supp. 898. In Shubert v. Angeles, 80 App. Div. 625, 80 N. Y. Supp. 146, an injunction was granted against an actress appearing for a rival house in violation of her contract; but it there appeared that she was engaged by the plaintiff because of her special talent as a mimic of other actresses and actors, and that her part could not be taken by another. The salary agreed to be paid defendant was quite moderate, and indicates that his part was quite ordinary, and manifestly could be easily filled. It is undisputed that he was ill, and that a continuance under the contract with plaintiff would endanger his health and be likely to destroy his voice altogether.

The court below felt constrained to grant the injunction because of the peculiar provision of the agreement. We are of opinion, however, upon all the facts disclosed, that the plaintiff was not entitled to an injunction during the pendency of the action, and that the order should be reversed, with $10 costs and disbursements, and the motion denied, with $10 costs. All concur.

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## SECTION IV. RELIEF FOR AND AGAINST THIRD PERSONS —EQUITABLE SERVITUDES.

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### DANIELS v. DAVISON.

(High Court of Chancery, 1811, 17 Ves. 433.)

In this case the Lord Chancellor (Eldon) pronounced the following judgment: I have already expressed my opinion, that the Plaintiff is entitled to a specific performance of the agreement for the sale of these premises to him; and, with regard to the subsequent sale by the Defendant Davison to the other Defendant Cole, my notion is, that the Plaintiff has an Equity to have a conveyance of the premises from Cole; upon the ground, that Cole must be considered in Equity as having notice of the Plaintiff's equitable title under the agreement; that Cole was bound to inquire; and therefore, without going into the circumstances, to ascertain, whether he had, or had not, actual notice, he is to be considered as a purchaser of the other Defendant's title,

subject to the equity of the Plaintiff to have the premises conveyed to him at the price, which he had by the agreement stipulated to pay to that Defendant; and that it is competent to the Court to make that arrangement as between Co-defendants.

The Plaintiff, therefore, deducting his costs out of the money he is to pay, must have such conveyance from one or both the Defendants, as the Master shall settle, if they differ; but I can go on farther than to regulate as between the Defendants the payment of that money, which the Plaintiff is to pay.

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## PEARCE v. BASTABLE.

(Supreme Court of Judicature, 1901, 2 Ch. 122.)

Cozens-Hardy, J. The case is plain. There was a contract, which is in no way impeached, for the sale to the plaintiff of the equity of redemption in certain leasehold property. On this contract a deposit was paid by the purchaser, and the title was accepted by him. Then the vendor became bankrupt, and a delay ensued, which was possibly occasioned by the bankruptcy proceedings. The draft assignment was sent in by the purchaser and approved, and the engrossment was forwarded. There is no dispute about the form of the assignment—it was of the leasehold property subject to the mortgage. The trustee in the vendor's bankruptcy has, to use plain language, the impudence to say that he will disclaim the contract without disclaiming the lease, keep the deposit paid by the purchaser and leave him to take such steps in the bankruptcy as he may think fit to take. That the trustee cannot be allowed to disclaim the contract without disclaiming the lease was plainly shown by the decision of Cave, J., in Re Kerkham, 80 L. T. Jour. 322. There, before bankruptcy, a man contracted to sell leasehold property to another who sold his rights under the contract to a third person. The trustee in the bankruptcy of the original vendor purported to disclaim the contract without disclaiming the lease, and the Court held that it was not competent for him to separate the subject-matter of the contract from the contract and keep the property, and that the disclaimer was void. That is precisely this case. The disclaimer which the trustee has purported to make is a nullity. What

is the position of the trustee in such a case? It has been contended on his behalf that the fact of the bankruptcy makes all the difference as regards the liability to specifically perform a contract. In support of that, Holloway v. York, 25 W. R. 627, has been referred to. The effect of that decision is correctly stated in Dart's Vendors and Purchasers, 6th ed. p. 1126—that is to say, that specific performance cannot be decreed against the trustee in bankruptcy of the purchaser. That decision has no application to a case in which the vendor's trustee in bankruptcy is the defendant. If any authority is needed in support of this finding it is to be found in Ex parte Rabbidge, 8 Ch. D. 367, 370, where James, L. J., said: "The result was that, upon the adjudication being made, the legal estate in the property vested in the trustee in the bankruptcy, subject to the equity of the purchaser under the contract. That equity gave him a right to have the property conveyed to him, upon payment of the purchase-money to the person to whom the property belonged." And Cotton, L. J., said: "The trustee in the bankruptcy . . . has vested in him the estate of the bankrupt in the property. He was not in the fullest sense of the word a trustee of the property for the purchaser, because the whole of the purchase-money had not been paid. But he took the legal estate in the property, subject to the equity of the purchaser under the contract, which gave the purchaser the right to say, Convey me the estate on my paying the purchase-money." Anything more explicit on this part of the case could not well be imagined. All that the plaintiff asks the trustee to do is to execute the engrossment already approved and assign the property to him, and, the plaintiff disclaiming any right of proof against the bankrupt's estate, an order for such execution, and that the defendant is to pay the costs of the action, must be made. . . .

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## GUPTON v. GUPTON.

(Supreme Court of Missouri, 1870, 47 Mo. 37.)

Bliss, Judge, delivered the opinion of the court.

This is a petition for the specific performance, or for compensation for its breach, of a contract to make a will in favor of plaintiff. The plaintiff, Mrs. Gupton, is a daughter, by a former marriage, of Celia

Barnett, wife of Morgan L. Barnett, both defendants; and the petition alleges that said Morgan L. Barnett, being himself childless, seventy-three years of age, and very infirm, applied to the plaintiffs to take him and his wife to their home, and take care of them during their lives, and, in consideration, agreed to devise and bequeath to them the land in controversy; that plaintiffs accepted the proposition, and in the fall of 1862 took defendants, Morgan and Celia Barnett, into their house, who became members of the family and were kindly and faithfully cared for by the plaintiffs, who are still ready to keep them in comfort and happiness during their lives; that, in pursuance of said agreement, the said Morgan, in 1865, destroyed an old will, and made a new one devising and bequeathing to petitioners all his property; that the possession of the farm in controversy was given up to plaintiff, Arrington, who made improvements upon it, rented it out, and paid the taxes. The petition further shows that on the 10th day of August, 1867, the said Morgan L. Barnett, in violation of his agreement, without consideration, and with full knowledge by the parties of all the facts, conveyed the principal part of his farm to said A. Madison Gupton, and the remainder to his wife, the said Celia, who have taken possession of the same. The petition closed with several specific prayers and with a prayer for general relief. . . .

From a careful examination of all the evidence bearing upon this part of the case, I cannot find that the plaintiffs failed in living up to the spirit of their agreement. It does not appear that any discontent had arisen in the mind of Mr. Barnett until the latter half of the fourth year of his residence with them, and we have seen how trifling were the first causes. An old man, nearly eighty, struck with paralysis, unable to walk, who, as he says, had recently given hundreds of dollars to the plaintiff and his family, who had made his will, leaving them everything, became excited about the collection of a few dollars by the one who was soon to receive everything; and when he paid him, while others were present, charges him, the next time he calls upon him, in a sarcastic and cutting manner, with bringing in witnesses to see it paid. It is manifest that the whole trouble was in the excited mind of Mr. Barnett, but how the feeling arose and increased does not appear from any direct testimony. It could not have sprung from Gupton and wife absenting themselves from his room, as he charges them both with doing, because it was the cause of and not

the effect of their being less familiar, and because, from the whole testimony, it is clear that his recollection of time, as well as events, is not to be relied on. A fact or two, however, throws a little light upon the matter. Defendant, A. Madison Gupton, is a nephew of plaintiff and was a frequent visitor at his house. In April it is shown that he asked Mr. Barnett to let him have his farm, and he would take care of him. Nothing further appears except that about the first of August, while the plaintiffs were away from home for some ten days, this Madison brings a magistrate to Mr. Gupton to acknowledge the deeds, and then the whole matter was closed up. This man, a frequenter at the house, his eye on the farm from the beginning of the troubles, his final success in obtaining the property—put these facts together, and may we not conjecture that he at least was not indifferent to the continuance of the difficulties that were about to prove so fruitful to him?

That an agreement to dispose of property by will in a particular way, if made on a sufficient consideration, is valid and binding, is settled in this State by Wright v. Tinsley, 30 Mo. 389, where the subject is considered at length and the authorities reviewed.

The statute of frauds is set up as a defense, inasmuch as the original agreement was not made in writing. But this defense will not avail for the obvious reason that the contract was in a great measure performed by both parties. The plaintiffs took Mr. and Mrs. Barnett to their house and provided for them until they left. The possession of the farm was also surrendered and the will was executed according to the terms of the contract. Nothing remained to be done by either party except the continued support of the makers of the will, which is tendered by the plaintiffs. Such partial performance has always been held to take the case out of the statute. (20 Mo. 84; 45 Mo. 288; Sugd. Vend. ch. 3, § 7, and cases cited in notes; 2 Sto. Eq. § 759 *et seq.*) Contracts like the one under consideration have been before the courts, and have uniformly been held to be valid when partially performed, and when the refusal to complete them would work a fraud on the other party. In Brinker v. Brinker, 7 Penn. St. 53, such an agreement was sustained, not because possession of the property was delivered, but because the will was executed according to the terms of the agreement.

The cases of Van Dyne v. Vreeland, 3 Stockt., N. J., 370, and Davidson v. Davidson, 2 Beasley, N. J., S. C., were both very similar to the present, and the verbal promises of the owners of the property

were enforced for the reason that the services and support contracted for had been rendered.

Defendants claim that the plaintiff is entitled to no relief in this action for the further reason that Barnett, by his deed to Madison Gupton, has put it out of his power to dispose of his property by will; that in any event the contract can not be fully executed until the death of Barnett, and hence his only remedy is by a suit for damages for a breach of the agreement. In support of this claim reliance is had upon McQueen v. Chouteau's Heirs, 20 Mo. 222, and upon Hatch v. Cobb, 4 Johns. Ch. 559, and Kempshall v. Stone, 5 Johns. 193, cited in that case. McQueen v. Chouteau's Heirs was a bill for specific performance founded upon a contract to sell, and the vendor had conveyed the property to a third person after having offered to fulfill. Upon this point the judge remarked that, in cases similar to this, courts of equity have refused to decree a specific performance of the contract, and have refused to entertain the bill for the purpose of compensating the complainant in damages, but have left him to his action at law on the agreement. The court, it will be seen, adopts no general rule, and the cases referred to are entirely consistent with the plaintiff's equity, even if specific performance could not be decreed.

Hatch v. Cobb was a case where the purchaser of land by contract had neglected to pay, and, after its conveyance by his vendor, filed his bill. The court decided that specific performance could not be decreed, that the complainant was not entitled to compensation in equity, and remitted him to his suit upon his covenant for damages if he was entitled to any. The court, however, admits that, in a special case, a bill for damages might be sustained; and, in referring to Phillips v. Thompson, 1 Johns. Ch. 131, where the bill was retained in order to afford compensation, says that the court made out a case of very clear equity for relief, and the remedy was precarious at law. The bill was dismissed in Kempshall v. Stone because "the remedy was clear and perfect at law by an action upon the covenant," the defendant having conveyed the land to a third person, for good consideration, without notice.

The doctrine of these cases is simply this: that when the vendor of land by contract conveys the property contracted to be sold to a third person, in such a manner that the land can not be reached, the court will not entertain a petition in equity for a specific perform-

ance merely for the purpose of compensating the purchaser in damages, but will leave him to his action upon the agreement. Some ground for equitable interference will be required, and in the case at bar there is abundant ground, even if the contract could not be specifically enforced. First, it is a parol contract, which can not be sued on at law, but which equity will enforce under the circumstances heretofore indicated. Second, Barnett has conveyed to Madison Gupton all his property, and a judgment for damages merely would be altogether useless. It must be made to fasten upon some property which can only be reached in equity, not by a creditor's bill, but as being subject to the plaintiffs' claim by the terms of the contract, or he is wholly without remedy. Third, the case made by the petition is altogether and throughout equitable; and having thus obtained jurisdiction, the court will give the plaintiffs any relief to which they are entitled.

A. Madison Gupton took with full notice, and in fraud of complainant's rights, and it is not in his power to remit us to a money demand. It would be a mockery, as well as a bounty to an unwarrantable interference by strangers in a case like the present, to say that the plaintiff is entitled to only a money judgment; and our courts have gone as far as any other in giving effectual relief. . . .

The judgments of the court below are reversed and the cause remanded, with directions to proceed as herein indicated. The other judges concur.

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## WEIS v. MEYER.

(Supreme Court of Arkansas, 1866, 1 S. W. 679.)

Cockrill, C. J. Weis' complainant in equity, for the specific performance of a contract to convey lands, was dismissed upon general demurred, and he has appealed. He was not a party to the contract which he sought to enforce, but was the vendee of one who was named in it as a beneficiary of its provisions. The only question seems to be, did this give Weis the right to enforce the contract?

The complaint alleges that the owners of a plantation in Chicot County conveyed a part of it to Isaac Hilliard, in 1879, and sold

or leased other parts of the place to divers other persons, among whom were the mercantile firm of Dryfus & Meyer; that afterwards, when the lands were about to be sold under a decree foreclosing a lien superior to the rights of the vendees, the vendors, in order to protect them from injury, entered into an agreement in writing with Dryfus & Meyer, by which it was arranged that the latter parties should buy in all of the lands subject to be sold under the decree, the greater part of which still belonged to the original vendors, and immediately convey, by quitclaim deeds, to the parties who had already purchased parts of the plantation referred to; an arrangement being made by which Dryfus & Meyer should be made whole for the amount paid by them in discharging the decree. It also alleged that Dryfus & Meyer purchased the land under the decree, and took a conveyance to themselves in execution of the agreement; and that afterwards Dryfus conveyed to Meyer all his right, title, and interest in the premises, and that Meyer bound himself to carry out the agreement entered into by the firm, but that he now refuses to execute a deed to Hilliard, or to the appellant, who is Hilliard's vendee.

Taking the allegation of the complaint as true, Dryfus & Meyer, upon their purchase under the decree, held the naked legal title to the lands that had been previously conveyed to Hilliard in trust for him, and it was their legal duty to execute a deed to him in accordance with their contract. After the conveyance by Dryfus to Meyer, the latter held the legal title subject to the same duty. The obligation of Dryfus & Meyer was assumed for their own as well as for the express benefit of Hilliard and others in similar circumstances, and was induced by their common grantors, who were resting under a legal obligation to protect from harm the interests in the lands they had sold.

The right of a party to maintain an action on an agreement made with another for his benefit is a doctrine to which this court has given its assent, and it entitled Hilliard to maintain suit in his own right to enforce the contract set forth. Hecht v. Caughron, 46 Ark. 132, The appellant, by Hilliard's conveyance to him of his entire interest, succeeded to his rights, and was entitled to file the complaint in his own name.

The decree must be reversed, and the cause remanded, with instructions to overrule the demurrer.

## ROBINSON v. APPLETON.

(Supreme Court of Illinois, 1888, 124 Ill. 276, 15 N. E. 761.)

SHOPE, J. This was a bill filed by the executors of the last will of James E. Cooley, deceased, for the specific performance of a contract, made by their testator with David B. Sears, since deceased, for the sale of several tracts of land. The law is well settled, that the vendor may have a specific performance of a contract for the sale of land decreed against his vendee. (Chambers v. Rowe, 36 Ill. 171.) The remedy in cases of specific performance is mutual, so that either the vendor or vendee may avail of it. Story's Eq. Jur. secs. 723, 789, 790, 796; Andrews et al. v. Sullivan, 2 Gilm. 332; Burger et al v. Potter et al. 32 Ill. 66.) This remedy extends in favor of the personal representatives of a deceased vendor (Burger v. Potter, supra), and against subsequent purchasers or assignees of the vendee, taking with notice. (Story's Eq. Jur. sec 789; Champion v. Brown, 6 Johns. Ch. 398.) The proceeding in this case may be regarded as in rem, as against appellants, who took as assignees of the original purchaser. It is clear that the vendor or his personal representatives can not have a personal decree against appellants, unless they, in their purchase from the vendee, Sears, assumed the payment of the unpaid purchase money as part of the price they were to pay Sears for his interest in the land. . . .

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## WHATMAN v. GIBSON.

(High Court of Chancery, 1838, 9 Sim. 196.)

THE VICE-CHANCELLOR. The Defendant Gomm admits, by his answer, that he does threaten and intend to use the house numbered seven, as a family hotel and inn and tavern; there can be no doubt, therefore, that he has brought himself within the words of the covenant in the deed of February 1799.

Now, though neither the conveyance to Cull, nor the conveyance to Austin (under which the parties severally claim), has been pro-

duced, yet, I must take it as a fact, that those deeds recited that Cull and Austin had executed the deed of February 1799: and, with respect to that deed, it seems to me that the matter is to be considered, in this Court, not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed, namely, that Fleming had determined and proposed, and did thereby expressly declare that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row, that the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereinafter contained or expressed in regard to the several houses to be erected theron, and in all other particulars. Then follow the stipulations; and, whatever may be the form in which the covenant is expressed, the stipulations are plain and distinct. One of them is that none of the proprietors of any of the several lots or parcels of land intended to form the row, shall, at any time or times or on any account or pretense whatever, erect or suffer to be erected on any of the several lots or parcels of land, which shall be to them respectively belonging for the time being or on any part of them or any of them, any public livery stables or public coach-house, or use, exercise or carry on, or suffer to be used, exercised or carried on thereon or on any part thereof, the trade or business of a melting founder, tobacco-pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern keeper, common alehouse keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business, whereby the neighborhood may be, in any respect, endangered or annoyed, or burn or make, or suffer to be burnt or made, on any of the said lots or parcels of land or on any part of any of them, any bricks or lime; and that no other building or buildings than good dwelling-houses or lodging-houses shall be erected in front of any of the said lots.

It is quite clear that all the parties who executed this deed, were bound by it: and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the deed, are not bound by it. I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighboring houses used in such a way as to preserve the general uniformity and respectability of the row, and consequently

in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.

As the release of 1802 recites that Austin executed the deed of 1799, I must take it as a fact that he did execute it; and then, whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a court of equity ought to enforce: and, as the Defendant Gomm admits that he intends to carry on one of the prohibited businesses, he comes within the purview of the deed, and ought to be restrained from so doing by the injunction of this Court. . . .

Injunction granted.

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## HARTMAN v. WELLS.

(Supreme Court of Illinois, 1913, 257 Ill. 167, 100 N. E. 500.)

FARMER, J. The bill in this case was filed by appellant to enjoin appellees from violating a building line agreement entered into between appellant and the grantor of appellees, and for a mandatory injunction to compel appellees to remove certain porches erected in violation of said building line agreement. . . . . . .

The existence of the building line agreement and its violation by appellees are not controverted. They claim they had no actual notice of the existence of said agreement, but it was a matter of record before they or their predecessor in title purchased lot 3, and they were bound to know of its existence. The real defense made by appellees is that appellant's property is not damaged by the porches constructed in violation of the agreement, and that on account of their cost, the material out of which they are constructed and the nature of the construction it would be inequitable to compel their removal. No complaint is made by appellees of the injunction restraining them from completing, repairing or rebuilding said porches, or any part therof, which project more than four feet east of the building. We are at a loss to understand why, if it was inequitable to require the removal of said structures projecting beyond the building line, it would not also be inequitable and unauthorized to enjoin their completion and

maintenance. It is apparent that in their incompleted state they are of little value for use, and if their completion and repairing would be a violation of the agreement authorizing interference by injunction, it would seem their maintenance would be also. Restrictions against the use of property held in fee, it is true, are not favored, and doubts will, in general, be resolved against them, but where the intention of the parties is clearly manifested in the creation of the restrictions they will be enforced in a court of equity. (Eckhart v. Irons, 128 Ill. 568; Hutchinson v. Ulrich, 145 id. 336, Hays v. St. Paul M. E. Church, 196 id. 633; Curtis v. Rubin 244 id. 88.) It is true, parties may by their own acts place themselves in a position where equity will not interfere, or the property and the use to which it may be put and the character of the vicinity and environment may be so changed that the purposes for which the restrictions were imposed will not be affected by their enforcement. In such cases enforcement may be denied. (Ewertsen v. Gerstenberg, 186 Ill. 344; Curtis v. Rubin, *supra.*) There was nothing shown as to the use of the property here involved, its environment or the acts of the parties which would bring it within the class of cases where the enforcement of such restrictions has been denied. The building of the porches was begun without the knowledge of appellant and when he was absent from home. As soon as he returned and discovered the building line agreement was being violated he made known to appellees his objections. Appellant had kept and performed the covenants on his part by paying to Lederer the $2000 in cash and giving lot 3 the benefit of an easement of five feet off the north side of lot 4 for light and air. All of this appellees were bound to know, as the agreement was a matter of record.

The evidence as to whether appellant's property was damaged by the violation of the agreement was conflicting, but we do not think that was a material question. In Consolidated Coal Co. v. Schmisseur, 135 Ill. 371, the court, in discussing the enforcement of negative covenants in courts of equity, said it was well settled that equity would entertain bills for injunctions to prevent their breach although the breach would cause no substantial injury or although the damages might be recoverable in an action at law. "This is upon the principle that the owner of land selling or leasing it may insert in his deed or contract just such conditions and covenants as he pleases touching the mode of enjoyment and use of the land. As said in Steward v. Winters, 4 Sandf. Ch. 587: 'He is not to be defeated when the cove-

nant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.' (Hill v. Miller, 3 Paige, 254; Macher v. Foundling Hospital, 1 Ves. & B. 188; High on Injunctions, 1142.) In this latter class of cases the court proceeds upon the ground that the grantor or lessor having expressly stipulated that the grantee or lessee shall not do the particular thing complained of, the latter is bound to refrain, and the former is not required to submit to the opinions of others as to whether he will or will not suffer substantial injury." That case was cited and quoted in substance in the opinion in Star Brewery Co. v. Primas, 163 Ill. 652. In Steward v. Winters, *supra,* cited in both the last mentioned cases, Vice-chancellor Sanford, delivering the opinion of the court, said: "It is said that the remedy at law for damages is adequate, and that, so far from there being an irreparable injury by the continuance of the breach of this covenant, it is shown there can be no injury at all. I apprehend that we are not to regard this subject in the manner indicated by the latter proposition. The owner of land selling or leasing it may insist upon just such covenants as he pleases touching the use and mode of enjoyment of the land, and he is not to be defeated, when the covenant is broken, by the opinion of any number of persons that the breach occasions him no substantial injury. He has the right to define the injury for himself, and the party contracting with him must abide by the definition." We do not regard it necessary to cite further authority upon this question. None in this State, at least, will be found to the contrary.

In our opinion the case made by appellant entitled him to the mandatory writ prayed for, commanding appellees to remove the structures extending beyond the building line. . . .

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## *IN RE* NISBET AND POTTS' CONTRACT

(Supreme Court of Judicature, (1906) 1 Ch. Div. 386, 409.)

COZENS-HARDY, L. J. Now, the suggestion which is at the root of the appellant's argument is this, that a squatter can wholly disregard restrictive covenants affecting a building estate. That is so startling

a proposition, and so wide-reaching, that it must be wrong. The value of estates in the neighborhood of London and all large towns, and the amenity of those estates, depend almost entirely upon the continuance of the mutual restrictive covenants affecting the user and the enjoyment of the property; and when we are told that the squatter, notwithstanding that he is a mere trespasser, is to be in a better position than that occupied by a person deriving a title strictly through the original covenantor, one feels that there must be an answer to the argument; and I think the authorities, when carefully examined, make the answer quite plain. The benefit of a restrictive covenant of this kind is a paramount right in the nature of a negative easement not in any way capable of being affected by the provisions of the Statute of Limitations on which the squatter relies. The only rights extinguished for the benefit of the squatter, under s. 34 are those of persons who might, during the statutory period, have brought, but did not in fact bring, an action to recover possession of the land. But the person entitled to the benefit of a restrictive covenant like this never had any cause of action which he could have brought, because unless and until there is a breach, or a threatened breach, of such a covenant, it is impossible for the person entitled to the benefit of it to bring any action. It appears, therefore, so far as the squatter himself is concerned, that both during the currency of the twelve years and after the expiration of the twelve years, there could be no possible answer to the claim of anyone seeking to enforce the covenant. In fact, there would, so far as he is concerned, be no difference between this covenant, which is in the nature of an equitable easement, and a legal easement strictly and properly so called. But although the squatter took the property subject to this equitable burden, it may be that the present vendor, who purchased from or through the squatter is able to say that the burden does not affect the property in his hands. But what must he prove in order to claim this exemption? He must prove that he is a purchaser for value of the legal estate without notice. If in the old days he had simply pleaded "I am a purchaser for value," such a plea would have been demurrable; he would have had to go further and allege and prove that he was a purchaser for value without notice, and he must do the same at the present day. Now, can the present vendor allege and prove that he was a purchaser for value without notice? I think not. It is not necessary, of course, to prove actual notice; that has not been contended. But if a purchaser chooses to take a title without

making full inquiries, he cannot be allowed to say that he had no notice of that which a full abstract would have disclosed. On this point the observations of North, J., *In re* Cox and Neve's Contract (1891) 2 Ch. 109, and the passages from his judgment which have been referred to, are so much in point that I may venture to read them. He says: "I must say that I dissent entirely from the proposition that the purchaser would have taken the property free from the restrictive covenant, if he had made no inquiry. On the contrary, I think he would have been bound by it, and for this reason. He had agreed by the bargain contained in the conditions of sale to accept a title of less than forty years. That cannot relieve him from all knowledge of the prior title, or, it would come to this,—that, if a man was content to purchase property on the condition that he should not inquire into the title, he would acquire a title free from any existing restrictions, and would not have constructive notice of any incumbrance."

Of course, the law does not permit of anything so absurd as that, and I should be sorry to think that there could be any real doubt upon the subject. In the case of a lessee the law has gone possibly one step further, because in Patman v. Harland 17 Ch. D. 353, it has been held, and so far as I know it has never been questioned, that a lessee is affected with notice of any restrictive covenants the existence of which he would have learned if he had investigated the lessor's title, even though, since the Vendor and Purchaser Act, 1874, the lessee is not entitled, under an open contract for a lease, to require the production of the lessor's title. As Sir George Jessel in that case said, that alteration of the law did not really prevent or interfere with the application of Tulk v. Moxhay, 2 Ph. 774. If the lessee wanted to escape from that obligation, he, in agreeing to take the lease, should have required the production of the lessor's title. So that the doctrine has been extended, and I venture to think properly extended, not merely to a case where a purchaser under an open contract would be affected with notice of a document forming part of the chain of title, but also, at least in the case of a lease, to a case where a purchaser under an open contract would not be entitled to require production of the documents which alone could give him notice. I think that a squatter, who has been in possession for more than twelve years, is certainly in no better position that any other person. He cannot make a good title without delivering an abstract extending over the full period; and if the pur-

chaser is willing to take a title depending upon the Statute of Limitations and the effect of s. 34, he must take such title subject to the equitable burden, as it is often called by analogy to Tulk v. Moxhay, 2 Ph. 774, except in so far as it can be shown that the equitable burden has been got rid of by means of a purchaser for value without notice.

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## BADGER v. BOARDMAN.

(Supreme Court of Massachusetts, 1860, 16 Gray, 559.)

Bill in Equity to enforce a restriction in a deed from Oliver Downing to the defendant of one of several parcels of land on the westerly side of Bowdoin Street in Boston.

From the bill and answer and evidence it appeared that Downing, being the owner of all these parcels of land, which were described on a plan thereof, dated the 12th of December, 1843, and recorded in the registry of deeds on the 21st of March, 1844, conveyed to the defendant in fee simple the parcel or lot numbered 3 on the plan, with the building thereon standing, by metes and bounds and "subject to the following restriction that no out buildings or shed shall ever be erected westerly of the main building of a greater height than those now standing thereon;" and that on the 25th of December 1844, Downing conveyed the parcel or lot numbered 4 on the plan to George Roberts, with all the rights, easements, privileges and appurtenances thereto belonging, which afterwards came by mesne conveyances to the plaintiff. The bill was dismissed, and the plaintiff appealed.

Bigelow, C. J. The infirmity of the plaintiff's case is that there is nothing from which the court can infer that the restriction in the deed from Downing to Boardman was inserted for the benefit of the estate now owned by the plaintiff. If it appeared that the parties to that conveyance intended to create or reserve a right in the nature of a servitude or easement in the estate granted, which should be attached to and be deemed an appurtenance of the whole of the remaining parcel belonging to the grantor, of which the plaintiff's land forms a part, then it is clear, on the principles declared in the recent decision of Whitney v. Union Railway, 11 Gray, 359, that the plaintiff would be entitled to insist on its enjoyment, and to enforce his rights by a

remedy in equity. But there is an entire absence of any language in the deeds under which the parties claim, from which it can be fairly inferred that the restriction in the deed to the defendant against erecting his building above a certain height was intended to enure to the benefit of the estate now owned by the plaintiff. The restriction is in the most general terms, and no words are used which indicate the object of the grantor in inserting it in the deed. Nor is there any language in the deeds under which the plaintiff claims title, which refers specifically to this restriction; or from which any intent is shown to annex the benefit of this particular restriction to the plaintiff's estate. Generally, when such a right or privilege is reserved, the purpose intended to be accomplished by it is stated in the conveyance or can be gathered from a plan referred to therein, or from the situation of the property with reference to other land of the grantor. All parties then take with notice of the right reserved and the burden or easement imposed. But the conveyances in the present case contain no such clause, nor is there anything in the terms of the grant, or in the circumstances surrounding the parties when it was made, to lead to an inference in favor of the claim set up by the plaintiff. For aught that appears, it might have been intended by the parties for the benefit of the grantor only so long as he remained the owner of any of the land of which that conveyed to the plaintiff originally formed a part. However this may be, it is certain that the defendant took his grant without any notice, either express or constructive, that this restriction was intended for the benefit of the plaintiff's estate. This is the material distinction between the case at bar and that of Whitney v. Union Railway, above cited. And it is vital to the rights of the parties, because, as the case stands, the plaintiff is not entitled to avail himself of the equitable principle, that the defendant has taken his estate with notice of a stipulation for the benefit of the estate now owned by the plaintiff, which in equity by accepting the grant the defendant would be bound to observe. We are therefore of opinion that the clause in the deed to the defendant, creating the restriction on the enjoyment of his estate, must be construed as a personal covenant merely with the original grantor, which the plaintiff cannot ask to have enforced in this suit.

Bill dismissed, with costs.

## DICKENSON v. GRAND JUNCTION CANAL CO.

(Cases in Chancery, The Rolls Court, 1852, 15 Beav. 260.)

The Master of the Rolls. . . . The object of the suit is to restrain the Defendants, the Grand Junction Canal Company, from using a well sunk by them near Tring, in Bucks, at a place called the Cow Roast Lock, to compel them to fill up this well, and to restrain them from excavating any other well, whereby the supply or flow of water in the stream called the Bulbourne may be obstructed from flowing down to the Plaintiffs' mill. . . .

The first question that arises under this state of circumstances is, whether this is such a contract, as this Court will restrain the parties to it from violating, and upon this I cannot entertain the slightest doubt. The consideration for it was valuable, and the Company obtained the advantage of that consideration in the cessation of those continued actions by which they were harassed, and in which, up to that time, they had failed, and had had to pay large and repeated damages.

The next question is, whether the acts of the Defendants are a violation of this contract. The report of Mr. Cubitt shows conclusively, that by means of the pumping at the well, the waters are diverted from the said rivers; and independently of the decision of the Court of Exchequer, I should, on the evidence of his report, have entertained no doubt that the Company had committed a violation of this contract and of this Act of Parliament, by pumping the water out of this well into the summit level of the canal. The decision of that Court, however, on the case sent by Lord Langdale, is in my opinion conclusive on this subject, notwithstanding the arguments I have had addressed to me, to distinguish the facts there stated from the facts in evidence before me.

If it be a contract duly entered into between the parties, it is no answer to a violation of it to say, that it will not inflict any injury upon one of the contracting parties. If the Plaintiffs have purchased from the Company a right to preserve the waters in the Rivers Bulbourne and Gade from being diverted in any other manner than as diverted at the passing of the Act of 58 Geo. 3, it is no answer to them

to say, that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated.

It is therefore, in my opinion, a matter of no moment in this case, that the Plaintiffs have given no evidence of any actual damage done to them, or of any actual diminution of water at their mills. Having established that the acts of the Defendants are a violation of the contract entered into between them and the Plaintiffs, and a violation of the Acts of Parliament passed to carry such contract into effect, the Plaintiffs are entitled to call upon this Court to protect them in the enjoyment of that right which they have so purchased, and this Court is bound to preserve it from being broken in upon.

I am of opinion, therefore, that I must grant a perpetual injunction to restrain the Company from further excavating &c. &c., and that the Defendants must pay the costs of this suit.

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## CLEGG v. HANDS.

(Supreme Court of Judicature, 1890, 44 Ch. Div. 503.)

Cotton, L. J. . . . The covenant in this case is that the said lessee will not at any time during the continuance of the demise, directly or indirectly, buy, receive, sell, or dispose of, or permit to be bought, received, sold, or disposed of, in or about the demised premises, any ales or stout (other than best stout) other than such "as shall have been bona fide purchased of the said lessors, or from them, or either of them, either alone or jointly with any other person or persons who may hereafter become a partner or partners with them or either of them." It is said that these latter words shew that the covenant was not intended to extend to the assigns of Clegg & Wright, because part of the definition of the persons who are included in the expression "lessors" is repeated here in terms which exclude the full application of that definition. But I cannot think that that is so. The covenant, reading it by the light of the definition, was entered into with the lessors, Clegg & Wright, and each of them, and the heirs, executors, administrators, and assigns of them and each and every of them; and al-

though it perhaps was not necessary to have added these words at the end of the covenant, I cannot think that that addition prevents the covenant from being a covenant with the assigns of those who were the grantors of the lease to the Defendants.

But then it is said, as I understand the argument, that it can only have been intended to include such assigns as carry on the business of brewers at the particular brewery which was assigned to Cain, and where the business of brewing is no longer carried on. The case of Doe v. Reid, 10 B. & C. 849, was much relied upon for the purpose of that construction, but it was a case where the language was different, and in my opinion there is nothing here to shew such an intention. Then there is this clause: "Provided they or he shall at such time deal in or vend such liquors as aforesaid, and shall be willing to supply the same to the lessee of good quality and at the fair current market price." Well, it was pointed out by one of us in the course of the argument, that there is some protection granted here to the publican by this provision that the beer shall be of good quality, and that it shall be supplied at the fair current market price.

That, in my opinion, shews clearly that it was not intended in this case to restrict the benefit of the covenant to the persons carried on this brewery at this particular place, for it does not in any way refer to the beer which is to be provided, as being beer made by the landlords or their assigns. The words are, "Provided they or he shall at such time deal in or vend such liquors." It shows that there was no intention whatever to stipulate that the persons entitled to the benefit of the covenant were to be persons who made beer. It was not provided that they should continue to make the beer they were selling; but it was provided that it should be of good quality and be supplied at the fair current market price, and that they should deal in and vend beer. Considerable light was to my mind thrown upon the true intention of the parties by what was put before us by Mr. Collins in his reply, that at the time the covenant was entered into these landlords not only made beer, but bought beer, and supplied those who were not bound by any restrictive covenants to take beer from them alone. That, I think, shews what they were intending to provide for, viz., not that they should only supply beer which they themselves made, but that they should go on doing what they were then doing, supply beer either by making it, or by buying it, so long as they were able to supply it of good quality and at the fair market price. . . .

But then it is said that this Court has decided that the doctrine of Tulk v. Moxhay will not be extended beyond a restrictive covenant. Now, in Tulk v. Moxhay the covenant was not in its terms restrictive, but it implied that the piece of ground in question there was to be used only as an ornamental garden. That again implied that the purchaser was not to build on it, which was what he was about to do. In this case, even if the covenant was in form a contract to buy all beer from the Plaintiffs, that would involve a negative contract that he should not buy his beer from anybody else; and in my opinion this case does not come within the rule which we laid down in the case of Haywood v. Brunswick Permanent Benefit Building Society, 8 Q. B. D. 403. In that case land had been granted in fee in consideration of a rent-charge and a covenant to build and repair buildings, and the Court refused to enforce the covenant, considering the doctrine of Tulk v. Moxhay not applicable to the case of a covenant which was not in its nature restrictive, and could only be enforced by making the owner of the land put his hand in his pocket. In my opinion, both on the ground that here the covenant did run with the land, and also on the ground that the doctrine of Tulk v. Moxhay does apply, I think the order of the Vice-Chancellor is right.

LINDLEY, L. J. . . . Then comes a question as to whether this contract is one which can be enforced in equity, having regard to the doctrine relating to specific performance and injunctions. Mr. Collins has suggested that, although this covenant is negative in point of form, it is affirmative in substance, and that therefore an injunction ought not to be granted. But when you look at the whole of this case, you find that the covenant, which he suggests is affirmative, really involves a negative element in it. If you treat the covenant to keep open this place as a public-house and to sell beer there as an affirmative covenant, you cannot treat the covenant as to the buying of beer as merely an affirmative covenant to buy beer of the lessors. You must put in the words, "and the lessors exclusively." If you get that, you get a negative portion of the covenant which can be properly enforced consistently with the doctrine applicable to cases of this kind; and therefore, whether you regard it as an affirmative covenant with a negative element in it, or whether you regard it as split up, as it is here, into these two parts, partly affirmative and partly negative, that negative part can be properly enforced.

For these reasons it appears to me that the decision is right, and the appeal must be dismissed with costs.

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## GOULD v. PARTRIDGE.

(Supreme Court of New York, 1900, 52 N. Y. App. Div. 40, 64 N. Y. Supp. 870.)

The Phoenix Mills was the owner of a valuable water privilege, as well as of the means and appliances for utilizing the same. It was also the owner of a tract of land for which it had no particular use. To meet this condition of affairs it subdivided its surplus land into parcels and then sold the same to various parties. In order, however, to enhance the value of the land thus placed upon the market, and induce purchasers to buy, the company agreed to furnish a certain amount of power with each parcel sold. As a consequence, the land with this incident attached to it found ready sale, and the purchasers thereof immediately set about to erect buildings for manufacturing purposes upon their respective parcels, in reliance, doubtless, upon the right to the water power which their several grants secured to them. In these circumstances, if, as claimed by the plaintiff, there was a community of interest or a privity of estate between the original grantor and grantees, the covenant made by the former would unquestionably be one which would run with the land and one for the breach of which an action at law could be maintained by the covenantee or his grantees. But, even in the absence of any community of interest or privity of estate, it has been held that the owners of land may by agreement create mutual easements for the benefit of each other's land, which will be enforced in equity; that an easement of this character can be created by grant, and that the right to its enjoyment will in like manner pass as appurtenant to the premises in respect of which it was created. In discussing a similar proposition in the American note to Spencer's Case, 1 Smith, Lead. Cas. (6th Am. Ed.) 167, it was said: "But although the covenant when regarded as a contract, is binding only between the original parties, yet, in order to give effect to their intention, it may be construed by equity as creating an incorporeal hereditament (in the form of an easement) out of the unconveyed estate, and ren-

dering it appurtenant to the estate conveyed; and, when this is the case, subsequent assignees will have the right and be subject to the obligations which the title or liability to such an easement creates." . . .

The defendant took her title to the premises owned by her with actual and full notice of the covenant in the Howe deed, and of all the equities arising therefrom. Moreover, she and her predecessors in title gave practical construction to the language and obligations of that covenant by sustaining the burden which it imposed for a long term of years; and in view of these circumstances it would, as was said by Allen, J., in Trustees, etc., v. Lynch, supra, "be unreasonable and unconscientious to hold (her) absolved from the covenant in equity for the technical reason assigned that it did not run with the land so as to give an action at law." We think the interlocutory judgment appealed from should be affirmed, with the usual leave to answer. . .

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## ROBERTS v. SCULL.

(New Jersey Court of Chancery, 1899, 58 N. J. Eq. 396, 43 Atl. 583.)

Grey, V. C. . . .The complainant in this suit is the owner of a house and lot situate on the east side of United States avenue in Atlantic City. She alleges that forty years ago one Brown, being the holder in fee of a tract of land of which her lot formed a part, opened a street, now called United States avenue, and built two houses on each side of it, facing on said avenue and set back from the street or property line a distance of thirty-two feet, and afterwards sold lots on either side of said avenue; and that in each of the deeds conveying those lots there was inserted a condition that the house or houses to be built thereon should be in keeping with those already built by him and set back a distance of thirty-two feet from the property line, and that no stables or outbuildings should be erected on any of said lots; and that as a result of said restrictions United States avenue has been built up with cottages in good style, and said lots have been keep free from all buildings except such as face on United States Avenue. . . .

It appears to be settled law in the state that restrictive covenants of the character set forth in the bill, will be enforced in equity, not only against the original grantee, but also against all subsequent pur-

chasers with notice of the covenant. De Gray v. Monmouth Beach Co., 5 Dick. Ch. Rep. 329; Hayes v. Waverly &c. Railroad Co., 6 Dick. Ch. Rep. 345, and cases there cited.

The parties who may enforce such restrictive covenants are the original grantors with whom they were made and all subsequent purchasers of the lands to be benefited by them. The parties against whom they may be enforced are the grantees who accept deeds containing the restrictions, and all those who subsequently purchase the restricted lands with notice of the covenant.

The principle upon which a person not a party to a restrictive covenant is permitted to enforce it, is based upon the idea that the subsequent purchaser of lands to be benefited by the enforcement has made his purchase and paid his consideration in the expectation of the benefit to accrue to the land bought, from the observances of the restriction imposed by his grantor upon the use of the lots previously conveyed to the covenantor, and no injustice is worked upon the covenantor or his assigns with notice of the covenant by restraining them from using the land in a manner inconsistent with the contract under which they obtained the title and which fixed the price they paid with relation to the restrictions imposed. Tulk v. Moxhay, 2 Phil. 774. That is, the prior purchaser from the common grantor, by reason of the restrictions imposed, paid less price for his land; the party who subsequently purchased from the common grantor a part or the whole of the land to be benefited by the restrictions, bought in consideration of the benefits coming to his lot because of the restrictions. This relation is such a privity as supports an equity in the subsequent purchaser of the lot benefited by the covenant to enforce it.

But this rule, while operative to enable a subsequent purchaser of land to be benefited by a restrictive covenant to enforce it against the prior purchaser, who made it, and against his assigns, with notice of it, does not work inversely to support the claim of a prior purchaser from the original owner to enforce a restriction imposed by the latter upon a lot subsequently conveyed. De Gray v. Monmouth Beach Co., 5 Dick. Ch. Rep. 329. The prior purchaser did not buy in expectation of any benefit to be derived from the subsequent covenant not yet in existence, nor did the subsequent purchaser make his covenant with the common grantor with relation to lands which the latter had previously conveyed and in which he had no interest.

In order to entitle prior purchasers from a common vendor, or those claiming under them, to enforce such covenants, it must be shown that they are parts of a general plan adopted for the development and improvement of the property by laying it out in streets and lots, prescribing a uniform building scheme, regulating size and style of houses, or uses to which the buildings may be put. De Gray v. Monmouth Beach Co., *supra.* When there is such a general plan and covenants imposing uniform restrictions, each purchaser, as he buys his lot and accepts the restrictive covenant, pays his purchase-money in consideration of, and relying upon, the subsequent execution of the general plan by the imposition of like covenants upon succeeding purchasers. This equity arises in favor of a grantee under the restriction of the uniform plan, as well as against the original owner who promulgates and sells lots on the general plan and attempts to make subsequent conveyances in avoidance of it, as against a grantee who accepts a deed with the restrictions, and does acts in breach of them. . . .

There is a suggestion in the bill that there was such a general plan of improvement, but the supporting proof depends entirely upon the complainant's unaided deposition. She was not a purchaser from Brown, the common grantor, nor does she appear to have any knowledge of his original design in laying out the property. She testifies as to her information and belief as of the time when she purchased from Ladner, or some subsequent grantee, that the lot north of her and those on United States avenue were subject to covenants "that no dwelling-house could be erected on any of said lands except those that front on United States avenue, and set back thirty-two feet from said avenue."

No map of the lots is shown marking the building line, nor is there any proof of any action by the common grantor, Brown, indicating a design on his part to develop the land upon a uniform plan of which the covenants in the deed of Brown to Graham for the defendant's lot, fixing the building line, &c., formed a part.

The complainant herself does not appear to have any knowlege upon the subject save from hearsay. The coincidence that all the deeds conveying any portion of the property contained the same covenants would not, if it were true, be sufficient of itself to show that the covenant made by Graham on receiving his deed from Brown in 1888 was intended to be for the benefit of Ladner's lot, who had bought

from Brown in 1882, six years before. Mulligan v. Jordan, 5 Dick. Ch. Rep. 363.

The proof submitted does not support the claim that the covenants were part of a general building plan. . . .

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## McCLURE v. LEAYCRAFT.

(New York Court of Appeals, 1905, 183 N. Y. 36, 75 N. E. 961.)

This action was brought to restrain the defendant from erecting an apartment house upon premises owned by him situate on the southwest corner of 145th street and St. Nicholas avenue in the city of New York.

Either party owns land nearly adjacent to that of the other and on the same block. There is a four-story dwelling designed for but one family standing on the land of the plaintiff, while the premises of the defendant are vacant. Both parties took title from a common source and subject to a covenant, made November 9th, 1886, against the erection at any time upon any part of the tract to which the lands of the respective parties belong "of any buildings except brick or stone dwelling houses" or "any tenement, apartment or community house." On the 8th of December, 1886, the covenant was so modified as to permit the erection of churches upon the tract and to limit the period of restraint to twenty-five years. These covenants by express agreement ran with the land and the instruments containing the same were duly recorded as conveyances in the proper office. Shortly before the commencement of this action the defendant filed plans to erect and had begun the erection upon his premises of a six-story modern apartment house, "divided into forty-two independent and separate suites of rooms or apartments, each suite containing a complete set of rooms and improvements such as are usually found in a first-class private dwelling house."

In addition to the foregoing facts the trial court found as follows: "Tenth. That at the time when the conveyances hereinbefore set forth were made and entered into, the real property in the vicinity of the property hereinbefore described was occupied exclusively by small private dwellings, and was classed as a private residential district, and

such houses were built solely for one family and occupied by one family, and there were no places of business, flats, tenements or apartment houses in the immediate neighborhood of the property affected by the said covenants.

"Eleventh. That since the making of the said covenants and within the period of about ten years last past great changes have occurred in the neighborhood and in the class of buildings erected upon the property in said neighborhood, and in the immediate vicinity of the premises owned by the plaintiff and the defendant, and there has been erected upon such property, including the three corners directly opposite to defendant's premises, large apartment houses having a great many apartments therein, several on each floor and several stories in height, and which are occupied on the ground floor by places of business and used for business purposes, numerous flats or tenement houses have been built on the block fronting on One Hundred and Forty-fifth street between St. Nicholas and Bradhurst avenues, which is in the vicinity of plaintiff's and defendant's property."

"Fourteenth. That the erection upon the said land of the said apartment house which the defendant proposes to erect thereon will not decrease the fee value of the plaintiff's premises or of the land and dwellings within the tract hereinbefore described, but will increase the value thereof, and the use of the same as an apartment house will not make the neighborhood undesirable nor decrease the value of the adjoining property.

"Fifteenth. That the change which has taken place in the character of the neighborhood has made the property, including the tract hereinbefore described, especially the land owned by the defendant, undesirable for the erection of a private dwelling thereon.

"Sixteenth. That by reason of the change in the character of the neighborhood and of the immediate vicinity of plaintiff's property and defendant's property the same has been so altered as to render inexpedient the observation of the said covenants, and it would be inequitable to enforce the covenants hereinbefore set forth against the defendant, as the enforcement of the same would cause him great damage and would not benefit the owners of the adjoining property."

The complaint was dismissed on the merits, for the reason, among others, "that the character and condition of the neighborhood have so changed since the making of the said agreements that it would be inequitable to enforce a covenant prohibiting the erection of a structure

such as the defendant proposes to erect and equitable relief enjoining the defendant from erecting the said structure should be refused."

VANN, J. . . . Assuming, therefore, that the defendant was about to violate the covenant, the question is whether upon the facts found and approved by the courts below relating to the radical change in the situation of the property affected by the covenant, a court of equity was bound to refuse equitable relief in the form of an injunction and to leave the injured party to recover his damages in an action at law. If the granting or withholding of a permanent injunction is within the absolute discretion of the Supreme Court, the exercise of that discretion by the Appellate Division in favor of the plaintiff is beyond our power to review; but if the facts found compel the conclusion, as matter of law, that an injunction should be refused, as inequitable, the order of reversal was wrong and the judgment rendered by the trial court should be restored.

While a temporary injunction involves discretion, a permanent injunction does not when the facts conclusively show that it would be inequitable and unjust. A court of equity will not do an inequitable thing. It is not bound by the rigid rules of the common law, but is founded to do justice, when the courts of law, with their less plastic remedies, are unable to afford the exact relief which the facts require. Its fundamental principle, as its name implies, is equity. It withholds its remedies if the result would be unjust, but freely grants them to prevent injustice when the other courts are helpless. It cannot set aside a binding contract, but when the effect would be inequitable owing to facts arising after the date of the agreement and not within the contemplation of the parties at the time it was made, it refuses to enforce the contract and remands the party complaining to his remedy at law through the recovery of damages.

These principles were applied by this court in an important case which we regard as analogous and controlling (Trustees of Columbia College v. Thacher, 87 N. Y. 311). In that case adjoining landowners in the city of New York had entered into reciprocal covenants restricting the use of their respective lands to the sole purpose of a private residence and expressly excluding "any kind of manufactory, trade or business whatsoever." After the lapse of nearly twenty years the defendant permitted a building upon his land, which was bound by the

covenant, to be used for the business of a tailor, a milliner, an insurance agent, a dealer in newspapers and tobacconist. After commencement of an action by the other landowner to restrain such use an elevated railway was built and a station located in the street in front of the premises of both parties. It was found as a fact that the "railway and station affect the premises injuriously and render them less profitable for the purpose of a dwelling house, but do not render their use for business purposes indispensable to their practicable and profitable use and occupation. The said railway and station, however, do not injuriously affect all the property fronting on Fiftieth street and included in the said covenant, but only a comparatively small part thereof."

The trial court awarded a permanent injunction and the General Term affirmed the judgment, but the Court of Appeals reversed and dismissed the complaint on the ground that a contingency, not within the contemplation of the parties, had frustrated the scheme devised by them and rendered the enforcement of the covenant oppressive and inequitable.

This court obviously held that an injunction, under the circumstances, was not within the absolute discretion of the Supreme Court, for otherwise, according to its uniform rule of action, it would not have reversed the judgment or dismissed the complaint. The opinion of Judge Danforth, concurred in by all the members of the court, declared that there was a clear breach of the covenant which, under ordinary circumstances, would entitle the plaintiff to an injunction, but, he said, "though the contract was just and fair when made, the interference of the court should be denied if subsequent events have made performance by the defendant so onerous that its enforcement would impose great hardship upon him and cause little or no benefit to the plaintiff. (Willard v. Tayloe, 8 Wall. 557; Thomson v. Harcourt, case 66, p. 415, vol 2, Brown's Parliamentary Reports; Davis v. Hone, 2 Sch. & Lef. 340; Baily v. De Crespigny, L. R. (4 Q. B.) 180; Clarke v. Lockport and Niagara Falls Railroad Company, 18 Barb. 350)."

After reviewing the authorities cited, the learned judge continued: "In the case before us, the plaintiffs rely upon no circumstance of equity, but put their claim to relief upon the covenant and the violation of its conditions by the defendant. They have established, by their complaint and proof, a clear legal cause of action. If damages have

been sustained, they must, in any proper action, be allowed. But on the other hand, the defendant has exhibited such change in the condition of the adjacent property, and its character for use, as leaves no ground for equitable interference if the discretion of the court is to be governed by the principles I have stated, or in the cases which those principles have controlled. . . . The road was authorized by the legislature, and, by reason of it, there has been imposed upon the property a condition of things which frustrates the scheme devised by the parties, and deprives the property of the benefit which might otherwise accrue from its observance. This new condition has already affected, in various ways and degrees, the uses of property in its neighborhood, and property values. It has made the defendant's property unsuitable for the use to which by the covenant of his grantor, it was appropriated, and if, in face of its enactment and the contingencies flowing from it, the covenant can stand anywhere, it surely cannot in a court of equity."

This case was followed in Stokes v. Stokes (155 N. Y. 581, 590); Amerman v. Deane (132 N. Y. 335, 359); Conger v. N. Y., W. S. & B. R. R. Co. (120 N. Y. 29, 32); Page v. Murray (46 N. J. Eq. 325, 331). (See, also, Jewell v. Lee, 96 Mass. 145; Taylor v. Longworth, 14 Peters, 172, 174; Duke of Bedford v. Trustees British Museum, 2 My. & K. 552; Sayers v. Collyer, L. R. (24 Ch. Div.) 170).

So long as the Columbia College case stands, the judgment appealed from cannot, for the same principle controls both. In each the changed condition was wholly owing to the lawful action of third parties, which made the allowance of an injunction inequitable and oppressive. Indeed, an injunction in the case before us would be more oppressive than in the case cited, for it is expressly found, and the finding is final here, that the proposed erection would actually increase the value of the plaintiff's premises, while the enforcement of the covenant, without benefiting any one, would cause great damage to the defendant. It is a reasonable inference from the evidence that the rent roll of the defendant's land, with such dwelling houses on it as would rent to the best advantage, would not exceed $4,500 a year, while an apartment house such as he proposes to erect would rent for over $40,000 a year.

Nineteen of the twenty-five years which bounded the life of the covenant in question have passed, and the object of the parties in

making it has been defeated by the unexpected action of persons not under the control of the defendant. Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant estate a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive. No injustice is done, for the damages sustained can be recovered in an action at law, and the material change of circumstances so affects the interests of the parties as to make that remedy just to both. . . .

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## BREWER v. MARSHALL AND CHEESEMAN.

(New Jersey Court of Chancery, 1868, 19 N. J. Eq. 537.)

The injunction in this case restrains the defendant, Marshall, from selling or removing from the farm conveyed to him by the defendant, Cheeseman, known as the Swope farm, any marl, and from digging any marl on it except for the use of the farm. The defendants have filed their answer, and move to dissolve the injunction. . . .

THE CHIEF JUSTICE. . . . George Cheeseman was originally the owner in fee of the several tracts of land now respectively owned by the appellant, Mr. Brewer, and by the respondent, Mr. Marshall; that on the 23rd day of February, 1841, he conveyed to the grantor of the appellant, the lands now held by the latter, and also, by the same instrument, another tract of twenty-eight acres, and that in this deed there was a covenant in the following words, viz.: "Also, the said George Cheeseman, his heirs or assigns, are not to sell any marl, by the road or quantity, from off his premises adjoining the above property." The tract described in this covenant as that to which the restriction was to apply, is now owned by the re-

spondent, Mr. Marshall, who, notwithstanding the covenant just quoted, has exercised, and still claims, the right to sell marl therefrom. . .

From this view of the authorities, I am entirely satisfied that a court of equity will sometimes impose the burthen of a covenant relating to lands on the alienee of such lands, on a principle altogether aside from the existence of an easement or the capacity of such covenant to adhere to the title. So far I think the law is not in doubt, and the only question in this case, which I have regarded as possessed of any material difficulty, is whether the covenant now in controversy is embraced within the proper limits of this branch of equitable jurisdiction. The inquiry is, have courts of equity ever gone the length of enforcing contracts similar to the one now before us? . . .

But, in the second place it seems to me that this covenant, on which this suit rests, is illegal in itself, and absolutely void. The substance of this covenant is, that neither the former owner of these premises, nor his assigns, shall sell by the quantity any marl taken from these lands. This is not a restriction on the use of the land, for the marl can be dug up and used upon the land; but the restriction is on the sale of the marl after it shall have been dug up. Marl of course is an article of merchandise and the covenant restrains traffic in that article. It prohibits the sale of it at any time, in any market, either by the owner of the lands or by his assigns. Now it seems to me that this is a plain contract "against trade and traffic, and bargaining and contracting between man and man." That it is the rule that all general restraints of trade are illegal, has never been doubted since the famous opinion of Lord Macclesfield, in Mitchel v. Reynolds, reported in 1 P. Wms. 181. And the development of this rule, and its application under a variety of conditions, can be traced in the series of decisions which have been carefully collected and intelligently commented on in the notes to the case just cited in 1 Smith's L. C. 182. The reason upon which this rule is founded, is thus expressed by Mr. Justice Best, in Homer v. Ashford, 3 Bing. 326; "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, would be void." And so far has this principle been carried, that even in cases in which the restraint sought to be imposed is only partial, it has been repeatedly

held that such agreement will be void, unless it be reasonable, and that no such agreement can be reasonable in which the restraint imposed on the one party is larger than is necessary for the protection of the other. Horner v. Graves, 7 Bing. 743. Tested by these principles the covenant in question appears to be destitute of all the essentials of a legal agree-
denied. (Ewertsen v. Gerstenberg, 186 Ill. 344; Curtis v. Rubin, *supra*).
ment. The restraint it imposes is general both as to time, place, and persons. It transcends, by far, the limits of utility to the covenantee. I cannot say that this covenant is legal, any more than I can say that a covenant on the part of a farmer not to sell, nor permit any of the future owners of his farm to sell, any grain to be grown on his farm, would be legal. I think all such engagements are nugatory as opposed to the valuable rule of law just referred to, and which is designed, and is so well adapted, to promote commerce by preventing the imposition of all unnecessary trammels, either on labor or on property. In this view, I am prepared to say that the complainant's case has no legal foundation.

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## DR. MILES MEDICAL CO. v. PARK & SONS CO.

(United States Supreme Court, 1910, 220 U. S. 373, 394.)

Mr. Justice Hughes.—The complainant, a manufacturer of proprietary medicines which are prepared in accordance with secret formulas, presents by its bill a system, carefully devised, by which it seeks to maintain certain prices fixed by it for all the sales of its products both at wholesale and retail. Its purpose is to establish minimum prices at which sales shall be made by its vendees and by all subsequent purchasers who traffic in its remedies. Its plan is thus to govern directly the entire trade in the medicines it manufactures, embracing interstate commerce as well as commerce within the States respectively. To accomplish this result it has adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other. The one sort of contract known as "Consignment Contract—Wholesale," has been made with over four hundred jobbers and wholesale dealers, and the other, described, as "Retail Agency Contract," with twenty-five thousand retail dealers in the United States.

The defendant is a wholesale drug concern which has refused to enter into the required contract, and is charged with procuring medicines for sale at "cut prices" by inducing those who have made the contracts to violate the restrictions. The complainant invokes the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties and induces one of them to break that contract to the injury of the other and that, in the absence of an adequate remedy at law, equitable relief will be granted. Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co., 151 U. S. 1; Bitterman v. Louisville & Nashville Railroad, 207 U. S. 205.

The principal question is as to the validity of the restrictive agreements. . . .

The present case is not analogous to that of a sale of good will, or of an interest in a business, or of the grant of a right to use a process of manufacture. The complainant has not parted with any interest in its business or instrumentalities of production. It has conferred no right by virtue of which purchasers of its products may compete with it. It retains complete control over the business in which it is engaged, manufacturing what it pleases and fixing such prices for its own sales as it may desire. Nor are we dealing with a single transaction, conceivably unrelated to the public interest. The agreements are designed to maintain prices, after the complainant has parted with the title to the articles, and to prevent competition among those who trade in them.

The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish

the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system.

But agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void. They are not saved by the advantages which the participants expect to derive from the enhanced price to the consumer. People v. Sheldon, 139 N. Y. 251; Judd v. Harrington, 139 N. Y. 105; People v. Milk Exchange, 145 N. Y. 267; United States v. Addyston Pipe & Steel Co., 85 Fed. Rep. 271; on app. 175 U. S. 211; Montague & Co. v. Lowry, 193 U. S. 38; Chapin v. Brown, 83 Iowa, 156; Craft v. McConoughy, 79 Illinois, 346; W. H. Hill Co. v. Gray & Worcester, 127 N. W. Rep. (Mich.) 803.

The complainant's plan falls within the principle which condemns contracts of this class. It, in effect, creates a combination for the prohibited purposes. No distinction can properly be made by reason of the particular character of the commodity in question. It is not entitled to special privilege or immunity. It is an article of commerce and the rules concerning the freedom of trade must be held to apply to it. Nor does the fact that the margin of freedom is reduced by the control of production make the protection of what remains, in such a case, a negligible matter. And where commodities have passed into the channels of trade and are owned by dealers, the validity of agreements to prevent competition and to maintain prices is not to be determined by the circumstance whether they were produced by several manufacturers or by one, or whether they were previously owned by one or by many. The complainant having sold its product at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic. . . .

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## WHITNEY v. UNION RAILWAY COMPANY.

(Supreme Court of Massachusetts, 1858, 11 Gray 359.)

Bill in equity, filed at April term 1857, alleging that the plaintiff for forty years had been seised in fee of certain lands in Cambridge;

that she had incurred great expense in procuring a survey and plans thereof, and constructing and grading streets thereon, intending the same for private residences; that on the 10th of September 1851 she sold and conveyed by warranty deed (duly recorded) to Artemas White a lot of this land, subject to these restrictions: "That if the said Artemas White, his heirs or assigns, shall suffer any building to stand or be erected within ten feet of Lambert Avenue, or shall use or follow, or suffer any person to use or follow, upon any part thereof, the business of a taverner, or any mechanical or manufacturing, or any nauseous or offensive business whatever, then the said grantor, or any person or persons at any time hereafter, who at the time then being shall be a proprietor of any lot of land, represented upon said plan, east of lot No. 27 and north of Lambert Avenue, shall have the right, after sixty days' notice thereof, to enter upon the premises with his, her or their servants, and forcibly, if necessary, to remove therefrom any building or buildings erected or used contrary to the above restrictions, and to abate all nuisances, without being liable to any damages therefor, except such as may be wantonly and unnecessarily done."

The bill further alleged that White erected a stable on this lot, and kept horses for hire and at livery, against the remonstrance of the plaintiff, and to her nuisance and injury. . . .

The bill prayed for an injunction to restrain the defendants from erecting additional stables, or laying rails or constructing a turntable in the street, or keeping a stable for horses upon the premises, and for an abatement of these nuisances . . . .

BIGELOW, J.—The claim of the plaintiff to equitable relief rests mainly on the validity of the restrictions contained in her deed to Artemas White of September 10th 1851, under which the defendants hold the estate described in the bill. By the facts stated in the bill and admitted by the demurrer, it appears that the plaintiff was originally the owner in fee of a large tract of land, which she caused to be surveyed and laid out in lots, with suitable ways or streets affording convenient access thereto, intending to sell them to be used and occupied by private dwellings. One of these lots she sold and conveyed to White by the deed above mentioned, containing the clause as to the use and occupation of the premises, which is fully stated in the bill. This lot by mesne conveyances has become vested in the defendants. The plaintiff still continues the owner of a part of the tract originally laid out by her, and occupies a dwelling house thereon, nearly opposite to

the lot now owned by the defendants. She was therefore the original grantor by whom the restrictions were created, and, as the owner and occupier of a part of the estate out of which the land owned by the defendants was granted, and for the benefit and advantage of which the restrictions were imposed, she has a present right and interest in their enforcement. The purpose of inserting them in the deed is manifest. It was to prevent such a use of the premises by the grantee and those claiming under him, as might diminish the value of the residue of the land belonging to the grantor, or impair its eligibility as sites for private residences. That such a purpose is a legitimate one, and may be carried out, consistently with the rules of law, by reasonable and proper covenants, conditions or restrictions, cannot be doubted. Every owner of real property has the right so to deal with it, as to restrain its use by his grantees within such limits as to prevent its appropriation to purposes which will impair the value or diminish the pleasure of the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with a due regard to public policy, and without creating any unlawful restraint of trade. Nor can there be any doubt that in whatever form such a restraint is placed on real estate by the terms of a grant, whether it is in the technical form of a condition or covenant, or of a reservation or exception in the deed, or by words which give to the acceptance of the deed by the grantee the force and effect of a parol agreement, it is binding as between the grantor and the immediate grantee, and can be enforced against him by suitable process, both in law and equity. . . .

But it is very clear that a suit in equity to compel a compliance with such stipulations concerning the use of property must be seasonably commenced, before the persons in possession of the estate have expended money or incurred liabilities in erecting buildings or other structures on the premises. It would be contrary to equity and good conscience to suffer a party to lie by and see acts done involving risk and expense by others, and then permit him to enforce his rights and thereby inflict loss and damage on parties acting in good faith. In such cases, a prompt assertion of right is essential to a just claim for relief in equity. In the present case, the plaintiff can have no equitable relief to prevent the use or procure the abatement of the stable erected by White. Having stood by and permitted its erection, she cannot now invoke the aid of the court to enforce a remedy in equity for its re-

moval. Whether she has been guilty of further laches, so as to prevent her maintaining the bill against the defendant for acts done by them in enlarging the stable, can be determined only upon hearing the facts bearing on the question. . . .

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## SECTION V. CONSEQUENCES OF THE RIGHT OF SPECIFIC PERFORMANCE

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### LANGFORD v. PITT.

(In Chancery, 1731, 2 Peere Williams, 629.)

Upon a bill brought by the plaintiff for the performance of articles for a purchase, the case was: The plaintiff Langford, vicar of Axminster in Devon, did by attorney enter into articles with Governor Pitt for the sale of lands in Cornwall. The articles were dated November, 1725, whereby the plaintiff agreed to convey the premises to the governor and his heirs, on or before Lady Day then next, at the costs and charges of the governor, and as counsel should advise; upon the making of which conveyance the governor covenanted to pay £1500 to the plaintiff.

Governor Pitt lived until after Lady Day, but in 1722, long before the executing of these articles, made his will, by which he devised all his real estate to his son Robert Pitt for life, remainder to his eldest son John Pitt for life, remainder to his first, etc., son in tail male successively, with several remainders over, bequeathing all his personal estate to trustees to be invested in lands and settled as above; and dying soon after Lady Day, 1726, his said eldest son and heir laid claim to the premises, as descending to him, and made his will, wherein by express words he devised the premises thus articled to be purchased to his wife and others, in trust to pay his debts, etc., and soon afterwards died, leaving John Pitt his son and heir, to whom the governor

had devised all his estate expectant on the death of Robert Pitt the son. . . .

Then the question was between the defendants, whether the devisees of Robert Pitt the son, or the grandson under the will of the governor, were entitled to the lands thus articled to be purchased, for it was agreed that the purchase-money was to be paid by the executors of Governor Pitt.

And for the latter it was objected by the attorney and Solicitor-General, that when the governor by his will devised all his real, and also his personal estate to be laid out in land and all this to be for the benefit of his grandson John, after the death of his son Robert Pitt, either in one shape or other, these lands thus agreed to be purchased by the governor should pass; that nothing could be plainer than his intention to dispose of all his estate both real and personal; and Mr. Solicitor cited the case of Greenhill v. Greenhill, 2 Vern. 679, by which it is decreed that were a man articles to buy land, this gives the party contracting an equitable interest in such land, which he may devise, though before the day on which the conveyance is to be made.

Master of the Rolls. I admit the case of Greenhill and Greenhill, in which I myself was of counsel, to have been so determined; but this material difference is observable between the two cases: there the articles for the purchase were entered into by the testator before he made his will, and so the equitable interest which he gained thereby was well devisable; but in the present case Governor Pitt's will was made prior to the articles for this purchase, before he had any equitable interest in the land, consequently (Vide Green v. Smith, 1 Atk. 572; Potter v. Potter, 1 Ves. 437) when he had no kind of title, he could devise nothing; so that this interest in the premises gained by the governor's articles must have descended to his son Robert Pitt as heir-at-law, who might well devise the same; and though it may at first look strange, that when the governor devised all his real and personal estate, these words should not carry all, yet it will not seem strange, when it is considered that an estate purchased after the will cannot pass thereby; now these articles are as a purchase subsequent, and though the governor's executors are to pay for such purchase, they cannot have the benefit of it, being to advance the money only as a debt from their testator. . . .

## COLES v. FEENEY.

(New Jersey Court of Chancery, 1894, 52 N. J. Eq. 493, 29 Atl. 172.)

The bill is brought for the specific performance of a contract for the sale of land by the testatrix to the defendant Feeney, on the 26th of December, 1891, by which the testatrix, in consideration of $3,000, agreed to convey to the defendant Feeney, a tract of land in Jersey City, of which she was the owner, the conveyance to be completed on the 26th of January, 1892. The contract was signed by each of the parties.

Three days after the date of this agreement Mrs. Coles died testate of a will, by the first item of which she devised "so much of my real estate situate in Jersey City in the State of New Jersey derived by be from my son William F. Coles lately deceased as at my decease *shall remain unsold* and shall not then be improved by dwelling-houses or other buildings." This devise covers the land covered by the contract. . . .

The bill alleges that shortly after the will was proven the executors tendered a deed to Mr. Feeney for the tract of land in question and demanded payment of the purchase-money, and that he declined, not on the ground that the deed was not tendered at the time fixed by the contract, but because the executors were unable to give a perfect title.

The defendant Feeney answers, and bases his refusal to complete the purchase solely on the ground of the inability of the executors to make a complete title in the absence of the devisees of the lot in question, who, being numerous, were not made parties. . . .

PITNEY, V. C.—I do not think the rights of the parties turn upon the question, so much discussed in the briefs, whether or not the land in question "remained unsold" at the decease of the testatrix, and because sold was not devised by her under the first item of her will, or whether she "died seized" of it in such sense as to bring it within the scope of the power of sale contained in the thirteenth item.

If this contract of sale was a valid contract, its effect was to work a conversion of the land from real to personal property. This it was in the power of the testatrix to do, notwithstanding her will, which was made before the date of the contract. Such conversion, if made, had the effect of taking the land out from under the operation

of the first clause of her will and giving the proceeds of it to her residuary legatees and devisees as a part of her personal estate, and, in the absence of any power of sale, it seems to me entirely clear that the executors would have the right, and it would be their duty, to take proper proceedings to perfect the conversion by compelling the transfer of the legal title to the purchaser and obtaining from him the purchase-money. Miller v. Miller, 10 C. E. Gr. 354. In contemplation of equity, the title to the property vested in the purchaser as soon as the contract was executed and delivered, subject, however, to a lien in favor of Mrs. Coles for the unpaid purchase-money, and that lien is capable of being enforced by her executors against the specific devisees of the particular land, even in the absence of any power of sale, by compelling them to convey to the purchaser and compelling the purchaser to pay to the executors the purchase-money.

This right of the personal representatives depends entirely upon the validity of the contract, and in order to enforce such right they must establish its validity as against either the heir-at-law or devisee, as the case may be. . . .

This view of the case shows that the bill is defective in not making parties the several devisees under the first clause of the will. If they had been made parties I should say the executors were entitled to relief. But it is manifestly unjust, and not in accordance with equity, to ask the purchaser to take a title the validity of which depends upon a nice question of construction, when it is within the power of the executors to eliminate all question and room for debate by making the specific devisees parties.

The case may stand over, to enable the executors to bring in those devisees if they shall be so advised. Otherwise, I will advise that the bill be dismissed.

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## ROBERTS v. MARCHANT.

(High Court of Chancery, 1843, 1 Phillips 370.)

THE LORD CHANCELLOR. This was a suit by the administrator of the vendor against the purchaser of an estate for a specific performance of the agreement of sale. The Defendant by his answer

objected that the heir-at-law of the vendor ought to have been a party to the suit. The Vice-Chancellor Wigram allowed the objection. This is an appeal from that decision.

It was argued that by the contract the estate was converted into personalty, and that the heir-at-law had no interest in the matter. But that is to assume the very point in controversy, for the heir-at-law may dispute the contract and controvert its validity. It was further argued, that, as a general rule, it is not necessary to make parties to the bill those who are not parties to the contract; but that rule does not extend to representatives; and the heir-at-law is the representative of the vendor as to the realty. . . .

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## POTTER v. ELLICE.

(New York Court of Appeals, 1872, 48 N. Y. 321.)

This is an action against the heirs of a vendor, to compel the specific conveyance of land. The executors of the deceased vendor are not made parties. . . .

At the close of the testimony, the defendant's attorney "moved to dismiss the complaint, on the ground that the said Charles R. Westbrook and John Rossell were not made parties to the action." The motion was denied by the referee, who rendered judgment for the plaintiff to the effect that the property be conveyed by the defendant to the plaintiff; that the money paid into court by the plaintiff (upon a tender) remain until the delivery and execution of the said deed to the plaintiff, and that then the same be paid to the administrator of Ellice, upon application for the same to the court.

HUNT, C. It is difficult to say that this action is well brought, the administrators of Mr. Ellice not being made parties. The heir of Mr. Ellice holds the legal title, in trust, to convey the same to the vendee upon performance of the conditions of the contract. He is a mere instrument, having no real interest in the matter in a case where the contract is performed. The administrators are the real parties in interest. Both by the statute and the common law the interest in the contract passes to them. They are the parties to whom he money

is to be paid, and who have the entire beneficial interest in the contract. Their discharge or receipt is a necessary muniment to the vendee. They are the parties not only who receive, but who are to settle or to contest, as the case may be, the amount to be paid by the vendee in fulfillment of his contract. No one else can legally adjust the amount to be paid, or acquit for the payment. (2 R. S. 83; id., 194, No. 169; Havens v. Patterson, 43 N. Y., 221; Lewis v. Smith, 5 Seld., 502, 510; 1 Sug. on Vend., 264; Calvert on Parties in Eq., 327). The administrators are parties, without whose action some of the most important points cannot be determined. Among these are the existence of the contract and the amount to be paid in fulfillment of its terms. Admitting these general rules, the court below supposed that reasons existed why they should not control the present case. Among other things, it is said that the personal representatives of the vendor were tendered the amount claimed to be due upon the contract, according to their own statement of the amount due. How has this been established, and by whom? By witnesses in a suit to which the administrators were not parties. This is a loose rule, by which the parties are to be bound, and their rights cut off by testimony in suits to which they are not parties, and in which they have no opportunity to establish their rights. . . .

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## COOPER v. JARMAN.

(Equity Cases before the Master of the Rolls, 1866, L. R. 3 Eq. Cas. 98.)

On the 12th of October, 1863, the intestate had entered into a contract with Messrs. James and Robert Lawrence, for the erection, by them, of a house on a piece of freehold land belonging to him. The house was in course of erection, but not finished at the time of his death; it had since been finished, and Joseph Charles Jarman had paid £799.19s. out of the personal estate of the intestate to Messrs. Lawrence for the completion of the contract by them. The question now raised was, whether the payment of this sum ought to be allowed to Joseph Charles Jarman, as the legal personal representative of the intestate. . . .

LORD ROMILLY, M. R., after stating the facts, continued: The next of kin contend that this sum ought not to be allowed and that the heir-at-law must personally bear the expense of completing the house. The ground on which this is insisted on by the next of kin, is, that the contract was of such a character that the specific performance of it could not have been enforced against the intestate if he had thought fit to resist it, and that if he had done so, and had in the middle stopped the further building of the house, the only remedy which Messrs. Lawrence could have had against him would have been by an action for damages sustained by them by the breach of contract by the intestate. There can not, however, be any question but that the administrator would have been liable, in an action brought by the Messrs. Lawrence, if he had refused to allow them to complete the contract. . . . I think it cannot be good law that an administrator is bound to do an injury and inflict damages upon a person with whom the intestate had entered into a contract, and to prevent that person from completing his contract because, by so doing, he would increase the personal estate of the intestate. There is, as it appears to me, a wide distinction between the case of this description and the case of a contract for the purchase of a piece of land. In that case, the personal estate of the intestate, or testator, is bound to pay the purchase-money, provided a good title can be made; but if a good title cannot be made, then there is no contract, and no action would lie against the representatives of the intestate, because the contract, in the absence of any express stipulation, necessarily is inferred to have been to buy land with a good title; and if the deceased person had contracted to buy land with any particular title, in a manner to bind him, this contract would bind the personal estate in the hands of the next of kin. But I have seen no case, and I am unable to believe that any case can be found, where a legal personal representative has been made answerable for performing a contract entered into by the deceased person, and at the time of his death intended to be performed by him, merely because, according to the peculiar rules of equity relating to the doctrine of specific performance, such a contract could not have been enforced by a suit in equity against the deceased person, or against his representative. Here, unquestionably, the intestate had bound himself, as far as possible, during his lifetime. The house had been begun; the building was in progress when he died. If the

Messrs. Lawrence had, therefore, refused to go on with the building, an action would have lain against them at the suit of the administrator; and it cannot, in my opinion, be law, that the next of kin should be entitled to call upon the heir-at-law to resist the Messrs. Lawrence, and hinder them from coming on the land, and prevent them from completing the contract because, in the opinion of the next of kin, the damage sustained by the contractor would possibly be less than the amount to be paid for the fulfillment of the contract. Besides which, if I am so to hold, no rule could be adopted which would be certain. The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by the breach of the contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed; and if he resisted. and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit, should exceed the amount to be paid for the completion of the contract, could the legal prsonal representative be allowed to deduct this in taking the accounts? I apprehend clearly not. The administrator has, in my opinion, a clear duty to perform. The moral duty is distinct. It is to perform the contract entered into by his intestate. The legal duty, in this instance, as I believe it is in all cases where it is fully understood and examined, is identical with the moral duty. I am, therefore, of opinion that this sum has been properly allowed in the accounts of the administrator.

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## SPRAKE v. DAY.

(Supreme Court of Judicature, 1898, 2 Ch. Div. 510.)

The testator, by his will, dated June 2, 1893, appointed the plaintiffs and the defendant H. J. Sprake, to be executors and trustees thereof. And he devised his dwelling-house known as Weston Manor House, together with the stables etc., thereto belonging, and certain closes of land adjoining, to the use of Elizabeth Louisa Sprake-Day during her life, and after her decease to the use of her daughter Alice Maud Day (the other defendant) during her life. . . .

In May, 1893, the testator entered into a contract with some

builders for the erection of some cottages upon a part of the property thus devised to Mrs. Sprake-Day and her daughter. The testator had also entered into another contract with the builders for the erection of a house on some land situate at a place called Misterton which belonged to Mrs. Sprake-Day, it having been conveyed to her absolutely at his instance during his lifetime. At the time of the testator's death neither of these contracts had been completed, and after his death the builders were not allowed by the plaintiffs to finish the work. . . .

North, J. As regards the property which was devised by the testator for the benefit of Mrs. Sprake-Day and her daughter, and which was the subject of a contract for building existing at the time of his death, I think a case is made for an inquiry, because it seems to me that Cooper v. Jarman applies. It is said that that case stands by itself; but although, so far as I know, there has been no other case which supports it, on the other hand there is none against it, and it lays down an intelligible principle. It has been unreversed for a great many years, and though no doubt the point is one which does not often arise, still there the case stands, and I must follow it, but I do not think it applies to the Misterton property which was not given by the testator's will. That property had at some time before his death been conveyed direct to Mrs. Sprake-Day at his instance. Then the testator entered into a contract for the building of four cottages upon this land. This contract has not been completed, but the person entitled to the benefit of it has carried in a claim against the testator's estate, and it appears from the chief clerk's note that a certain sum has been allowed. I do not see that any claim has been made by Mrs. Sprake-Day in respect of this property. The property was conveyed to her out and out, and the testator entered into some contract with respect to it, but whether under such circumstances that she could have compelled him to carry out the contract I do not know. I can understand that there might be circumstances under which he would have been bound to carry out such a contract, by reason of some consideration moving from her to him to induce him to undertake the liability. But the evidence which has been adduced does not establish any liability of that kind, and I do not see how a person who for this purpose is a stranger—the owner of the property before the testator's death and not taking it under his will—can claim to have a contract entered into by the testator with a builder

to erect houses upon it carried out. Under these circumstances I can only direct an inquiry whether the testator had entered into any and what building contracts or contract affecting the property devised to Mrs. Sprake-Day for her life, with remainders over, and whether any and which of such contracts were uncompleted at his death in respect of which his estate was under any and what liability, and whether any and what compensation should be paid by the testator's estate in respect thereof.

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## NEWTON v. NEWTON.

(Rhode Island Supreme Court, 1876, 11 R. I. 390.)

DURFEE, C. J. This is a motion for leave to amend a bill in equity. The bill is brought by the widow and children of William Newton, late of Newport, deceased, against Edward F. Newton, administrator upon his estate. The bill sets forth that on the 4th day of February, 1847, William Newton conveyed to the defendant for $2,000, one undivided half part of a certain lot of land in Newport, and that on the 13th day of February, 1858, said William Newton conveyed to the defendant for $1,500 one undivided half part of a certain other lot of land in Newport. The bill further sets forth that there was among the personal property of William Newton which came into the hands of the defendant, in his capacity as administrator as aforesaid, as the plaintiffs have recently been informed, a certain bond or writing obligatory, executed by the defendant and delivered to William Newton, the purport of which was as follows, to wit: It recites the sales above mentioned, and binds the defendant under a penalty of $4,000 to fulfill an agreement by which he grants "the privilege to the said William Newton at any time, at his own option, for or within the term of seven years from the present date, to purchase the whole of said two estates for the sum of eight thousand dollars." . . .

If the administrator should purchase under the option, he should doubtless purchase for and in the name of the heirs at law, the property being real estate. In this state, where the next of kin and the heirs at law are generally the same persons, and where the real and personal estate is equally liable for debts, such a change in the form of the

assets, if wisely made, would be of small importance. But to test the power of the administrator, we may inquire what the result would be at common law. At common law the next of kin and the heirs at law are often not the same, and real estate is not liable to the same extent as personal property for debts; and therefore to concede to the administrator the power to accept the option would be to concede to him the power, to the extent of the option, to change the succession to the property, and to qualify its liability for the debts of the intestate. We think there is no principle on which this could be permitted. Moreover, in the case at bar, the administrator, to have accepted the option, would have had not only to pay $8,000, but also to exonerate the maker of the bond from partnership losses and liabilities. Neither the bill nor the proposed amendment offers to fulfill this condition, or shows that it was ever within the power of the administrator to fulfill it. Certainly the administrator had no power to bind the estate to such an exoneration by any contract of indemnity, if that was required for the fulfillment of the conditions. Such a contract would have been beyond his capacity as administrator. . . .

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## LAWES v. BENNETT.

(In Chancery, 1785, 1 Cox 167.)

Thomas Witterwronge, seized in fee of a farm called Bently, by indenture, dated 2nd October, 1758, demised the said farm to John St. Leger Douglas, Esquire, his executors, administrators, and assigns, for seven years under the yearly rent of £106 14s. 6d. and upon the back of the said indenture, was indorsed a memorandum or agreement signed by Witterwronge and Douglas bearing even date with the said indenture, whereby it was agreed by and between the said Witterwronge and Douglas, that in case Douglas should at any time after the 29th of September 1761, and before the 29th of September 1765, be desirous of absolutely purchasing the fee simple and inheritance of the said premises, mentioned in the said indenture, for the sum of £3000 to be paid by him to the said Witterwronge at the execution of the conveyance thereof, and of such his mind and intention should

give notice in writing to the said Witterwronge before the 29th September 1765, then Witterwronge agreed to sell to Douglas the fee simple and inheritance of the said premises for the said sum of £3000 and to execute proper conveyances thereof.

Thomas Witterwronge, by his will dated 1st September 1761, devised all his real estates of which he was seized or entitled to, unto his cousin John Bennett, and he thereby gave and bequeathed his personal estate to the said John Bennett, and to the plaintiff Mary, sister of the said John Bennett (after payment of his debts and legacies) to be divided equally share and share alike, and appointed John Bennett and plaintiff Mary joint executors.

Testator died in June 1763, and on 11th February 1764, John Bennett settled an account with plaintiff Mary, of all the testator's personal estate, and paid her £324 6s. 3d. as her moiety thereof, and the account was signed and allowed by both of them.

By deed poll, dated 2d of March 1762, made between the said John St. Leger Douglas of the one part, and William Waller Esquire of the other part, after reciting the said lease of 1758, and the memorandum or agreement thereon indorsed, the said John St. Leger Douglas, for the consideration therein mentioned, assigned the said premises and all his interest therein, and all benefit and advantage which should or might arise from the said agreement to the said william Waller, his executors, administrators, or assigns, for all the residue of the term then to come therein.

On the 2d February 1765, William Waller called upon John Bennett to perform the contract entered into by the testator for sale of the premises for £3000, which Bennett complied with, and accordingly by indentures of lease and release, dated 1st and 2d of February 1765, in pursuance and performance of the said agreement, so indorsed upon the said indenture of 1758, and in consideration of £3000 the said John Bennett did bargain, sell, etc. the said premises to the said William Waller, his heirs and assigns for ever.

In 1779 John Bennett died, leaving defendant his widow and executrix; and the present bill was filed by Thomas Lawes and Mary his wife (sister of the said John Bennet), stating, that they had not until lately discovered the sale of the estate to Waller, and claiming one moiety of the purchase money received by Bennett, as being part of the personal estate of the testator Witterwronge, and which he had

devised equally to Bennett and plaintiff Mary. And this was the single question in the cause, whether the premises being part of the testator's real estate at the time of his death, but sold afterwards under the circumstances aforesaid, the purchase money should be considered as part of the real or personal estate of the testator. . . .

MASTER OF THE ROLLS. Although this case may be new in species, yet the principles upon which it seems to me to depend are perfectly clear, and are so well established in this court, that if I am wrong it must be by misapplication of those principles. No stress can be laid upon the will of Witterwronge, for that is expressed in very general terms. He had two species of property, one of which gives to Bennett, the other to Bennett and his sister. Then which kind of property is the present? It is very clear that if a man seized of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. It seems to me to make no distinction at all. Suppose a man should bargain for the sale of timber, provided the buyer should give proper security for the payment of the money. This when cut down would be part of the personal estate, although it depends upon the buyer whether he gives security or not; (as to what has been said about Douglas' being able to release his power of election, I think a court of equity would relieve against that, if it appeared to be done collusively to oust the legatee of his personal estate;) when the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period. The case of Bowes v. Lord Shrewsbury, 5 Bro. Parl. Ca. 269, shows the nature of the property may be altered otherwise than by the act of the original owner, although that was altered by the act of the legislature and not of any third person: but it shows generally that there is no impossibility in the nature of the thing. As to the length of time, I think I can take no notice of it in this case, for here there is no pretense to presume the demand satisfied. On the contrary, it has been withholden for another reason. I must therefore declare this £3000 to be part of the personal estate of the testator, and that the plaintiffs are entitled to one moiety thereof, and the Master must inquire whether the plaintiff Thomas has

made any, and what settlement on the plaintiff Mary, etc. And as to interest, as it appears that Bennet laid out this money in the funds, and consequently has made interest of it; he must be answerable for interest, from 1st February, at 4 per cent. . . .

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## BAILEY AND WIFE v. DUNCAN'S REPRESENTATIVES.

(Kentucky Court of Appeals, 1827, 4 Monroe, 256.)

OWSLEY, J. . . . We have already seen that Isaac Duncan, the husband, resided upon the land at the time of his decease, and that as respects the present contest, it is not competent for Bailey and his wife, who claim under his purchase, to contest the goodness of his equity, so that in deciding upon the widow's right to dower, the question arises whether or not a wife is entitled to dower in land, of which her husband dies possessed, though without having the legal title, but to which at the time of his death he is equitably entitled to a conveyance of the legal title from another?

Were this question to be decided upon common law principles, the answer would undoubtedly be in the negative. As early as Vernon's case, 4 Co. R. 1, it was held that a wife was not dowable of a use before the statute of uses; and since the statute, uses or trusts not executed by the statute have been repeatedly held not to give the wife a greater interest that uses at common law.

In the case of Bottomley v. Lord Fairfax, Prec. Ch. 336, the court say, "that if a husband before marriage conveys his estate to trustees and their heirs, in such a manner as to put the legal estate out of him, though the trust be limited to him and his heirs, that of this trust estate, the wife, after his death, shall not be endowed, and that this court hath never yet gone so far as to allow her dower in such a case."

In the case of Chaplin v. Chaplin, 3 Peere Wm. R., the chancellor says, "that as at common law, an use was the same as a trust is now, it follows, that the wife can no more be endowed of a trust now, than at common law, and before the statute, she could be endowed of an use."

And in the case of Godwin v. Winsmore, 2 Atkins, 526, Lord Hardwicke observes, that "it is an established doctrine now that a

wife is not dowable of a trust estate; indeed, says he, "a distinction is taken by Sir Joseph Jekyll, in Banks v. Sutton, 2 P. W. 708, 709, in regard to a trust where it descends or comes to the husband from another, and is not created by himself; but I think there is no ground for such a distinction, for it is going on suppositions which hold on both sides."

Thus stood the doctrine of the law upon the subject of estates in trust, until the passage of an act by the legislature of Virginia before the separation, and which has since been reenacted by the legislature of this state, and is contained in 1 Dig. L. K. 315.

The act provides, that, "where any person to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements or hereditaments, hath or shall have such inheritance in the use or trust, as if it had been a legal right, the husband or wife of such person would thereof have been entitled to courtesy or dower, such husband or wife shall have and hold, and may by the remedy proper in similar cases, recover courtesy or dower of such lands, tenements, or herditaments."

With respect to uses and trusts embraced by the provisions of this act, the doctrine of the common law has undoubtedly undergone a change, and although formerly a wife was not dowable of such a use or trust, she may now by the remedy proper in such a case, recover dower of the lands to which others are seized to the use, or in trust for the benefit of the husband. In deciding upon the question under consideration therefore, the main and only inquiry for the court, is to ascertain whether or not it was intended by the makers of the act, to authorize a wife to recover dower in lands, to which the husband had at his death an indisputable right in equity to a conveyance of the fee simple estate, though the right be devised under an executory contract for the title, and not resulting from an use or trust, expressly declared by deed. With respect to trusts of the latter sort, the provisions of the act are too explicit, in favor of the wife's right, to admit of a difference of opinion; and if we advert, as we should do, to the old law as it stood at the passage of the act, the mischief which must have actuated the legislature in making the change, and the remedy which the act has provided, we apprehend, but little doubt will be entertained as to the propriety of giving such a construction to the act, as will embrace all trusts, whether expressly declared by

deed or resulting from executory contracts, by construction of courts of equity. The interests of the cestui que trust is precisely the same, let the trust be created in the one way or the other, the justice of the wife's claim is as strong in one case as the other; and, as she was not dowable in a trust of either sort, before the enactment of the statute, the mischief to be remedied by the act, emphatically demands that the wife should be endowed of trust estates of both sorts.

We have been unable to find any case, either in this country or Virginia, where dower has been decreed to the wife, in an equitable estate in fee, to which the husband became entitled by contract, for a conveyance of the land; but the right of the wife to dower in such a case came before the appellate court of the state of Virginia, in the case of Rawton v. Rawton, 1 H. M. R. 92, and although a majority of the court decided against the claim of dower in that case, two out of the five judges composing the court, were expressly in favor of the claim for dower; and the decision of the others went not upon the idea of dower not being allowed in an equitable estate, but upon the principle that the equitable estate, of which dower was claimed, was not made out by the testimony in the cause. And in the case of Claibourn v. Claibourn, which afterward came before the same court, Judge Roane, who was one of the judges that decided against the widow's claim of dower in the former case, in remarking upon that case, after stating its circumstances, says, "the transaction having happened subsequent to the act of 1785" (the act of which the act of this country is a transcript), "the widow claimed her dower only under the provision of that statute. Three of the judges overruled her claim; but it was on the ground of no contract having been proved, as they thought, for more than a life estate, in favor of the husband: two other judges thought that the husband had an equitable estate in fee, and on that ground were in favor of the dower, under the act of 1785." In the course of his remarks he further says, "the counsel in opposition to the claim of dower, admitted that under the act of 1785, the widow was entitled to dower, provided it should appear that her husband had such an equity in a fee simple estate, as would authorize a court of equity to decree the legal estate." Thus it seems to have been the concurrent opinion of the bar and the bench of the supreme court of Virginia, that since the act of 1785, of which ours is a copy, that a wife is dowable, of any equity in a fee simple estate, belonging to

the husband, if it will authorize a court of equity to decree the legal title. . . .

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## HAMPSON v. EDELEN.

(Maryland Court of Appeals, 1807, 2 Harris & J. 64.)

Chase, C. J. In this case it appears that a considerable part of the purchase money was paid, and possession given of the land, prior to the obtention of the judgments by Hampson against Wade.

A contract for land *bona fide* made for a valuable consideration vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time. When the money is paid according to the terms of the contract, the vendee is entitled to a conveyance, and to a decree in chancery for a specific execution of the contract, if such conveyance is refused.

A judgment obtained by a third person against the vendor, mesne the making the contract and the payment of the money, cannot defeat or impair the equitable interest thus acquired, nor is it a lien on the land to affect the right of such *cestui que trust*.

A judgment is a lien on the land of the debtor, and attaches on it as a fund for its payment; but the legal estate in the land is not vested in the judgment creditor, although he can convert it into money, to satisfy his debt, by pursuing the proper means.

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## BLOCK v. MORRISON.

(Supreme Court of Missouri, 1892, 112 Mo. 343, 20 S. W. 340.)

Black, J. . . . The deed from Easton to Hammond states that it was made in consideration of $1,583, paid by Hammond, and pursuant to the considerations of a certain bond executed by Easton to Hammond and Wilkinson, dated the third of September, 1818. Hammond, therefore, held a title bond for the conveyance of the land as far back as 1818, which was before the date of the judgment under which

the property was sold. Did this title bond create in the vendee an interest in the land which was subject to sale under execution? The answer must be in the affirmative. The statute in force at that time provides that the sheriff's deed "shall be effectual for passing to the purchaser all the estate and interest which the debtor had or might lawfully part with in the lands at the time judgment was obtained." 1 Territorial Laws, 120, sec. 45.

In Brant v. Robertson, 16 Mo. 129, this court said: "When parties have bound themselves by agreement to convey land and to pay for it, equity recognizes an interest in the land as already in the purchaser, and the case is the stronger when the purchaser has actually paid in whole or in part; and in either case, the interest of the purchaser may be sold on execution, upon the principle that the vendor is to be regarded as seized in equity to the use of the purchaser. But if no money has been paid, and if the person who may become the purchaser is not actually under any obligation to pay, then there is no seizin in the seller, even in equity, to the purchaser's use, and there is no interest in the land in him which is liable to sale on execution." It is true the statute then in force made "all real estate, whereof the defendant, or any person for his use, was seized in law or equity," subject to sale on execution; and "real estate" was defined to be "all estate and interest in lands, tenements and hereditaments." The words of the statute then in force were different from the words of the statute now in question, but there is no substantial difference in their meaning. The statute now in question makes any interest in land which the debtor may sell subject to sale under execution. That a title bond for the conveyance of land gives the vendee an interest which he may sell cannot be doubted. The principle of law is well settled that, where there has been a contract for the sale of land, the vendor becomes the trustee of the land for the vendee, and that the vendee has an interest in the land which may be sold under execution. Papin v. Massey, 27 Mo. 445; Hart v. Logan, 49 Mo. 47; Morgan v. Bouse, 53 Mo. 219. In some of these cases the vendee had been put in possession, and in others the whole or a part of the purchase money had been paid; these circumstances may make out a stronger case, but the principle still stands, that the vendee in a title bond has an interest in the land which he may sell, and which he may enforce by specific performance, and which is subject to sale under execution. . . .

## HELLREIGEL v. MANNING

(New York Court of Appeals, 1884, 97 N. Y. 56.)

EARL, J.—This action was brought by the plaintiff to compel the defendant to specifically perform a contract for the purchase of land. . . .

Upon the trial, the counsel for the defendant offered as follows: "To prove that during the four years of the running of the contract in question, the buildings on the premises have never been painted, although they required painting; that they have been suffered to become dilapidated for want of painting, that Mr. Hellreigel has allowed them to run down; that he has realized every thing from the buildings without paying out anything on them for repairs; to show that he has permitted the sewers to be stopped up; that the cellars are filled with water to the depth of two feet and upward; that the gates have been broken off the hinges; that the sidewalks have been permitted to become out of repair, and dangerous for the people passing over it," and that, in consequence of all these, the building had depreciated in value to the extent of several hundred dollars. There was no allegation in the answer nor offer to prove that the plaintiff had done anything intentionally or willfully to damage the buildings or depreciate their value. The deterioration in the condition of the buildings seems to have been due to natural causes, and the ordinary use of them. It is not claimed that there is anything in the language of the contract which required the plaintiff to keep the premises in repair, and hence his conduct in reference to them must have been such that it would be inequitable and unjust for a court of equity to enforce the contract in his favor. There was no allegation in the answer, and no proof that the premises were not worth the sum which the defendant agreed to pay for them. There was no proof, or offer to prove, that the plaintiff had realized more than a fair interest upon his investment from the rent of the premises, and hence that he put into his pocket what he might well have expended in keeping the premises in good repair. We do not perceive that, under the circumstances, he owed the defendant any duty to keep the premises in repair. A party agreeing to sell and convey

premises at a future day does not, in the absence of stipulations to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use. Circumstances might occur which would impose such a duty upon the vendor; but they do not exist in this case, and were not offered to be proved. . . .

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## BLEW v. McCLELLAND.

(Missouri Supreme Court, 1860, 29 Mo. 304.)

NAPTON, J. On the 8th of November, 1856, Blew, the plaintiff, made a verbal contract with McClelland for the purchase of a lot in the town of Princeton, Mercer county, on which there was a tavern and other buildings. The improvements constituted the principal value of the property. The price agreed on was $1,550, five hundred of which was paid down. McClelland was to execute on the same day, or the Monday following, a title bond for a conveyance of the title when the purchase money was paid, and Blew was to give his notes for the balance of the purchase money. On Sunday, the 9th of November, the buildings were all destroyed by fire. Nothing further was done; the title bond, although tendered, was never received, and the notes for $1,050 were not executed. McClelland had a policy of insurance on the premises for eight hundred dollars, which he collected from the company, representing himself as the owner, and which in his answer he offers to treat as a liquidation of the purchase money, *pro tanto*. This suit is brought by Blew to recover the five hundred dollars purchase money advanced, and the only question presented by the record is whether, under these circumstances, the action will lie.

The case of Paine v. Meller, 6 Ves. 349, is understood to have determined that, where there is a contract for the sale of a house, and before a conveyance the house is burned down, the loss falls on the purchaser, and the purchaser is still bound to execute his agreement to pay the purchase money. This does not appear to have been the opinion of the Master of the Rolls in Stout v. Bailey, 2 P. Wms. 220, who thought, in such a case, the purchaser would not be bound. But Sir Edward Sugden seems to regard the decision of Lord Eldon, in

Paine v. Meller, as the true exposition of the law. It is based upon the doctrine that equity regards as done what has been agreed to be done, and therefore, after a valid agreement to purchase, looks upon the purchaser as the owner. Hence Sir Edward Sugden declares the law to be that a vendee, being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and, on the other hand, he will be entitled to the benefit which may accrue to the estate in the interim." (1 Sugden on Vendors, 277).

The principle has, in England, been carried to the extent of holding that, where an agreement was made for the purchase of an estate, in consideration of an annuity for life to the vendor, and he dies before the conveyance and before the annuity becomes due, the contract will still be specifically enforced. (Mortimer v. Cupper, 1 Bro. C. C. 156; Jackson v. Lever and others, 3 Bro. C. C. 605).

But the maxim of courts of equity, that whatever is agreed to be done is considered as actually performed, is confined to cases where the contract or agreement is a valid one and can be enforced. If the contract, by reason of its being by parol, is one which neither a court of equity or of law can enforce, and nothing has been done to withdraw it from the operation of the statute of frauds, the title remains as it was, both in law and equity, unaffected by the parol agreement; and whatever accidental losses the property may sustain must of course fall upon the owner. In such a case, it is clear that if, after the parol agreement to purchase, a valuable gold mine was found upon the premises, the purchaser could not compel a specific performance, unless there had been a change of possession or some other circumstance which courts have determined sufficient to take a case out of the statute. Neither ought he to be compelled to pay his purchase money, when a fire has destroyed the buildings which formed the principal inducement for the purchase. It would be very inequitable to adopt a rule which would not operate alike on vendor and vendee, which would leave it to the option of one to enforce the contract or not, as it might promote his interest or caprice. The case of McGowan v. West, 7 Mo. 569, was a case where the purchaser had taken possession, and by reason of that circumstance could have enforced a conveyance notwithstanding the contract was by parol. This court would not permit him to hold on to the land, and set up, as a defense to a

suit upon his note for the purchase money, that the contract was a parol one. In the present case, there was no change of possession, and there was no other circumstance which would have enabled the plaintiff to enforce a specific performance of the contract had the estate, instead of being almost rendered valueless, been unexpectedly increased in value. As the contract could not be enforced by the purchaser, it would be unjust to enforce it against him. (Cunnutt v. Roberts, 11 B. Monr. 42). . . .

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## COMBS v. FISHER.

(Kentucky Court of Appeals, 1813, 6 Ky. 51.)

Combs being the owner of a tract of land, with a cabin and other improvements thereon, on the 10th day of January, 1806, sold the same to Fisher, and promised to deliver possession thereof to Fisher, in the same situation it then was, against the first day of January next thereafter. To recover the amount of an obligation executed by Fisher in part pay for the land and improvements, Combs prosecuted suit and obtained judgment in the Casey Circuit Court. For the purpose of obtaining relief against that judgment, Fisher exhibited his bill in chancery, alleging the purchase of the land and improvements aforesaid, the promise of Combs to deliver possession in the same situation it was when the purchase was made, etc., and charges that the place was not delivered in that situation, but that the cabin was burned and a number of rails destroyed, etc. He prayed and obtained an injunction on the judgment at law, and asked for general relief. The injunction was dissolved; but on a final hearing of the cause, the Circuit Court decreed compensation for the cabin and the rails, the value whreof was ascertained by the verdict of a jury. From which decree this writ of error has been prosecuted. We think the decree of the Circuit Court correct. The evidence in the case satisfactorily proves the promise on the part of Combs to deliver possession of the place in the same situation it was when Fisher purchased, and that the cabin was burned and rails destroyed before possession was delivered. Combs' express promise, therefore, should be binding on him. The circumstance of the cabin having been burnt by accident, as is urged by

Combs, cannot relieve him from his express understanding. For wherever the covenant is express, there must be an absolute performance, nor can it be discharged by any collateral matter whatever—Esp. N. P. 270. The objection to the smallness of the amount in controversy we think not entitled to any weight. The cause was finally tried on the bill, answer, etc. No objections were taken to the jurisdiction by plea in abatement, nor does any exist on the face of the bill; upon such a state of pleadings, no objection to the jurisdiction can be maintained on the final hearing of the cause.

DECREE AFFIRMED.

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## EDWARDS v. WEST.

(In Chancery, 1878, L. R. 7 Ch. D. 858.)

FRY, J. The plaintiffs in this case allege that the option of purchase which was given by the lease of the 29th of September, 1870, to be exercised by a notice given on or before the 25th of March, 1875, and to be carried into completion on or before the 29th of September, 1875, was enlarged by subsequent correspondence, that by virtue of that correspondence a new contract was constituted under which the 29th of September, 1876, was substituted for the 25th of March, 1875, and that the option was exercised on the 28th of September.

I will assume, for the purpose of the present judgment, that the Plaintiffs are correct in that contention. There are, therefore, four dates material to consider; first, that of the contract creating the option; secondly, that of the injury to the premises; thirdly, that for the exercise of the option; and fourthly, that for the completion of the purchase according to that option.

Now the point which I am about to decide arises from the payment of a sum of between £11,000 and £12,000 by the insurance offices to the Defendant consequent upon the injury to the property by fire on the 6th of May, 1876. The Plaintiffs contend that that money so received by the Defendant was received by him as part-payment of the £14,000, which the Plaintiffs, under the option, were bound to pay; and that contention has been supported by three methods of argument.

In the first place, it has been said that by the law of England, the exercise of the option causes it to relate back to the time of the creation of the option in such a matter as to render the property for this purpose property of the purchaser as from the date of the contract which gave the option; so that here, although the option was given by a contract made in April, and not exercised till the 28th of September, yet that when it was so exercised on the 28th of September, it operated retrospectively, and made the property the property of the purchaser as from the month of April preceding, and consequently made the vendor trustee of the fruits of the property for the purchaser. Now it appears to me that such a conclusion would be highly inconvenient, because it would place a person under the obligations which rest upon a trustee, or make him free from them, by reference to an act which was not performed until a future day; and the retrospective conversion of a person into a trustee of property is a result eminently inconvenient. . . .

Upon that general principle, then, I should hold that the argument is untenable. But, then I am told that the case is covered by authority, and for that purpose my attention is very properly drawn to the cases which began with Lawes v. Bennett, 1 Cox, 167, and which shew that where there is a contract giving an option to purchase real estate, and the option is not exercised till after the death of the person who created the option, nevertheless the produce of the sale goes as part of his personal estate, and not as part of his real estate. Now, whether Lawes v. Bennett is or is not consistent with the general principle upon which conversion has been held to exist, it is not for me to say. It is enough for me to say that the case has been followed in numerous other cases, though it has been observed upon by more than one Judge as somewhat difficult of explanation. I think that the language of Lord Eldon in Townley v. Bedwell, 14 Ves. 591, and of Vice-Chancellor Kindersley in Collingwood v. Rew, 3 Jur. (N. S.) 785, shows that they were not satisfied that that case was consistent with the general principles which were applicable to cases of conversion; and therefore, although I should implicitly follow Lawes v. Bennett in a casse between the real and personal representatives of the person who granted the option, I do not think that I am at liberty to extend it so as to imply that there is conversion from the date of the contract giving the option as between the vendor and the purchaser who claim under it. It is to be borne in mind that no authority can be produced which has ex-

tended the doctrine of Lawes v. Bennett in the slightest degree beyond what was decided in that case. The principle, whatever it be, has never been applied except as between the real and the personal representatives of the original creator of the option, and I for one shall not extend it, because I think that it is limited by the general principle to which I have adverted. Therefore, upon that ground, I hold that there is no conversion of the estate from an earlier date than the 28th of September, when the notice was given. The fire having taken place, and the insurance money having been received at an earlier date, the intended purchaser has no right, upon the general principles of conversion, to assert a title to that money. . . .

## SECTION VI. PARTIAL PERFORMANCE WITH COMPENSATION.

### O'KANE v. KISER.

(Indiana Supreme Court, 1865, 25 Ind. 168.)

Frazer, C. J. . . . The payment of the money and the conveyance of an unincumbered title were dependent acts, and, at law, there could be no recovery unless such a title was offered on the day. McCulloch v. Dawson, 1 Ind. 413. It follows that in the present case, the suit on the note can only be sustained, if at all, as being in equity to compel a specific performance, time not being regarded in equity as so strictly of the essence of the contract. But one who comes into equity seeking to compel a specific performance must show that he has performed, or offered to perform, the acts on his part to be performed, which constituted the consideration of the contract which he asks the court to compel the other party to perform. This is thoroughly settled by the authorities, acting upon the maxim that "he who seeks equity must do equity." It is also in entire harmony with the principles of justice and honesty. The purchaser here agreed to pay his money for an unincumbered title, not for the mere covenant of the vendor against in-

cumbrances. He purchased the land, not the vendor's contract, and having contracted for the former unincumbered, a court of equity will not compel him to take it with on unpaid mortgage upon it, and the covenant of a solvent party against the mortgage. The power of the court to compel a specific performance is an extraordinary power, and will not be exercised in behalf of a party who is either unwilling or unable to do that for which the defendant agreed to pay.

We cannot perceive that any influence, in such a case, ought to be given to the fact that the purchaser had knowledge that the incumbrance would not be due on the day fixed for making the conveyance. It was certainly competent for the parties to contract for its removal before its maturity. They did so contract in this case, and must abide by their agreement.

The judgment is reversed, with costs, and the cause remanded for a new trial.

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## HILL v. BUCKLEY.

(High Court of Chancery, 1811, 17 Ves. 394.)

The Master of the Rolls (Sir William Grant). The facts of this case are very few; and there is very little controversy upon them. In the particular, which was sent by the Defendant's agent to the Plaintiff's, which is the basis of the subsequent negotiation, the woods, called the Kestle Woods, including the Gulberry Marsh, were represented as containing two hundred and seventeen acres and ten perches. In fact there was not that quantity by about twenty-six acres. No deception was intended. The Defendant's agent fell into a mistake; the nature and cause of which now distinctly appear: but I do not think myself warranted by any evidence in the cause to infer, that the Plaintiff knew the real quantity. A very intimate acquaintance with the premises would not necessarily imply knowledge of their exact contents; while the particularity of the statement descending to perches, would naturally convey the notion of actual admeasurement. Where a misrepresentation is made as to the quantity though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase-money for so much as

the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influneced in an equal degree by the quantity, which both believe to be the subject of their bargain: therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known; and I do not think I could upon any principle in the case of Mortlock v. Buller to which this bears no resemblance, exempt these defendants from this equity upon the ground of their being trustees, and not owners.

But there is a difficulty in this case from the nature of the mistake which must have influenced the vendors in their estimate of the price in a manner, that, if a rateable abatement were now to be decreed, would be extremely disadvantageous to them; for, though they believed they had two hundred and seventeen acres to give to the purchaser, and must be supposed to have asked a price in proportion, yet they did not believe that it was all woodland. They imagined, that twenty-eight acres consisted only of hedges and fences, and other waste. They could not certainly set the same value upon that, though perhaps it was considered of some value, as upon land, covered with wood of mature growth; therefore, by a rateable abatement from the purchase-money it is clear they must allow to the purchaser much more than they would have received from him; and consequently they would be compelled to accept less than it was ever in their contemplation to take. That is not all. The purchaser also would obtain a better bargain than he ever had in his contemplation. He was in the course of the negotiation furnished with the value of the woods, *qua* wood, as ascertained in the year 1805. The value being given, it was immaterial, in that respect, whether the woods were spread over a greater or less number of acres. The valuation had no reference to the quantity of ground. All the wood upon the estate was comprehended; and it was represented to the purchaser, that what he was to get was wood, which in 1805, was of the value of £3500. He has got all the wood, upon which that value was set. Is he entitled, also, to the value of twenty-six additional acres of wood; which he would have in effect by an

abatement, made to him out of the purchase-money upon the proportion merely of quantity and price. The wood would have been no more valuable to him, if in fact it had occupied two hundred and seventeen acres, instead of one hundred and eighty-eight; nor would he have paid a shilling more for it; as the price of the wood was not fixed with reference to the ground, which it covered. Therefore it is only in the price of the soil, and not in the price of the wood that the purchaser could be injured by the mistake of the vendor; the particular representing the wood as occupying two hundred and seventeen acres: the purchaser has the right quantity of wood; but not of soil. He is therefore entitled to some abatement; as they gave him reason to believe, that he was to obtain two hundred and seventeen acres of soil; but the abatement is to be only so much as soil, covered with wood, would be worth, after deducting the value of the wood; and with an abatement, to be ascertained upon that principle, the argument ought to be carried into execution. . . .

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## JOYNER v. CRISP.

(North Carolina Supreme Court, 1912, 158 N. C. 199, 73 S. E. 1004.)

Brown, J. . . .The facts are, as appears by the pleadings: That the property in question, known as the "Peebles Place," belonged to the feme plaintiff for her life, and after her death to her children some of whom are minors. At the time the contract referred to was entered into between the plaintiff and the defendant, the defendant admits he knew the status of the title, and there is nothing in the pleadings themselves which indicate, or even allege, that any imposition was practiced upon the defendant, or that he entered into this contract except with his eyes open. The contract upon its face indicates plainly that it does not lie within the power of the plaintiffs of their own will to comply with it. It appears upon its face that the plaintiffs own practically nothing but a life estate, and that the only method to carry out the contract was by appealing to the judicial tribunal to decree a sale of the infants' estate. The following excerpts from the contract are plainly indicative that resort to a judicial tribunal was absolutely essential to its performance, viz: "This option is to remain in force

for ninety days, or until such time as the parties of the first part can obtain by special proceedings in the superior court of Pitt county a judicial decree confirming to the party of the second part a fee-simple title." Again: "Upon the performance of the above stipulations by the party of the second part, the parties of the first part will agree to execute in their own proper persons and by the decree of the superior court a deed in fee simple," etc.

The plaintiffs in this case had no power to enter into a contract to sell their children's land, and a mere promise to resort to a court for the purpose of decreeing a sale of it cannot possibly be enforced, for it is beyond the power of the plaintiffs to predicate what the judgment of the court may be. Upon this principle it is held that a party cannot recover upon a contract wherein a guardian who owned certain interest in land of which his ward was part owner agreed to institute and to carry through court proceedings necessary to the consummation of a sale or exchange of such property. Zander v. Feely, 47 Ill. App. 660; LeRoy v. Jacobosky, 136 N. C. 444, 48 S. E. 796, 67 L. R. A. 470. There have been cases where guardians have entered into such contracts, and, upon failure to perform them, have been held liable in damages personally. Mason v. Waitt, 4 Scam. (Ill.) 127, and Mason v. Caldwell, 5 Gilman 196, 48 Am. Dec. 330. But we find no instance where such contract has been specifically performed by decree of court, unless it was to the ward's interest.

In regard to the contention that the defendant is entitled to the partial performance and conveyance of the life estate, and damages in the way of abatement of the price, it may be said that we recognize the general rule that, where the vendor has not substantially the whole interest he has contracted to sell, yet the purchaser can insist on having all that the vendor can convey with compensation for the difference. But in this case it is apparent on the face of the contract that it was to be performed as a whole, stand or fall as an entirety, and therefore it cannot be specificially enforced as to part.

It is admitted by the defendant in his answer that he knew that the land in fee belonged to the plaintiff's children. It semes to be well setled that the rule that when a person makes a contract for the sale of real estate, in which he has only limited interest, he may be compelled in equity to convey as much of the property as lies in his power to convey, with a deduction from the agreed price, does not

apply where the purchaser at the time of the sale had notice of the defect in the vendor's title. . . .

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## WANAMAKER v. BROWN.

(South Carolina Supreme Court, 1907, 77 S. C. 64, 57 S. E. 665.)

The following is the circuit decree, omitting the formal judgment: "The above-entitled action for the specific performance of a contract for the sale of real property, with the reservation of a portion of the purchase money, as indemnity against an outstanding incumbrance of an inchoate right of dower, came on to be heard before me, on the pleadings and testimony taken and reported by the master. From the testimony, I find as a mater of fact: That on August 31, 1905, the defendant, being the owner of a certain lot of land, described in the complaint, and hereinafter described in this decree, agreed to sell and convey the same to the plaintiff by a good and sufficient deed of conveyance. . . . That on September 23, 1905, the plaintiff tendered, and offered to pay, to the defendant the sum of $5,400, as the balance of the purchase money due under said agreement, and demanded the delivery of a good and sufficient deed of conveyance to said property. Whereupon the defendant tendered a deed of conveyanc to said property, which contained the usual covenants of warranty against the grantor and all others, but did not have indorsed upon it, nor was it accompanied by, renunciation of the dower right of Mrs. Mary Ann Brown, the wife of the defendant, in said property. The plaintiff refused to accept the deed tendered on the ground that there was not indorsed upon it, nor was it accompanied by, a renunciation of said dower rights, but offered, and still offers, to accept said deed of conveyance, and pay the balance of the purchase money, if the defendant would consent to a deduction from the purchase money of such amount as might be ascertained by the courts to be the value of such dower rights, or to the retention by plaintiff of such porportion of the purchase money as might be necessary to indemnify him against the claim of Mary Ann Brown for dower, so long as said claim might continue to exist as an incumbrance on said property; the payment of such amount so reserved to be made to the defendant at such time as the incum-

brance of the outstanding inchoate right of dower should be removed, and to be secured by a mortgage on the property conveyed. The defendant declined this proposition or to deliver any other deed than that tendered by him, on the ground that his wife refused to renounce dower, and that he was not called upon to give any other indemnity against such claim than that contained in the usual covenant of warranty contained in the deed tendered. The defendant in 57 years of age, and his wife 52. If the dower were now accrued, it would be one-sixth the value of the property.

"As matter of law, I conclude, under authority of Payne v. Melton, 69 S. C. 373, 48 S. E. 277, that an outstanding inchoate right of dower is such an incumbrance as a purchaser should be protected against. This protection may be given either by reducting from the purchase money the actual value of such inchoate right of dower at the time of the purchase, as indicated in that, and other cases, or by providing for a retention of a portion of the purchase money, secured by a mortgage on the land, until such dower right has vested, or ceased to exist, as an indemnity against such outstanding incumbrance. This latter provision seems to me more equitable and just than the former, on account of the difficulty of arriving at the present money value of the inchoate right. . . .

POPE, C. J. The facts of this case are set out in the decree of his honor, the circuit judge, which is affirmed for the reasons therein stated. APPEAL DISMISSED

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## SAVINGS BANK CO. v. PARISETTE.

(Supreme Court of Ohio, 1903, 68 O. St. 450, 67 N. E. 896.)

SPEAR, J. It is insisted by counsel for plaintiff in error that the stipulation in the option is for a deed conveying the entire property free from any and all rights, claims and incumbrances, and of the latter class is the inchoate right of dower; that the obligation, therefore, rested on the vendor to clear the title, and convey free of all claims of every kind; that failing this the vendee should have been allowed to retain so much of the purchase money as will protect his title against such inchoate right of dower, and the vendor decreed to convey on re-

ceiving the remaining part of the purchase money, and that the refusal of the circuit court to so adjudge was error. . . .

What was the contract specific performance of which plaintiff demanded, and what the breach, if any? The parties were the vendor, the husband, and the vendee, the plaintiff. The paper itself carries the information that it was when drawn contemplated to be executed by some one other than the vendor, and since the plaintiff was aware that he had a wife living, the inference is natural that she was the person whose signature had been expected. The paper further showed that she had not signed, and the fact found is that she had made no agreement to sign or sell the property, or release her inchoate right of dower. Furthermore, the absence of her signature would suggest a refusal by her. The Company knew, therefore that it was dealing with the husband alone as to his right and title in the property, it knew that the wife could not be compelled to sign, and that, therefore, the contract was impossible of specific execution if construed to include her dower. It knew that it was accepting a contract which on its face did not purport to sell any interest but that of the husband, and especially did not purport to sell or agree to convey any inchoate dower of the wife. In this situation of affairs the Company chose to agree to pay the stipulated price for just what the option purported to sell. No fraud or overreaching or mistake of any kind is charged. The vendor is ready to convey just what the stated terms of his contract obligate him to convey. How can the Company reasonably demand that the court import into the contract a stipulation to convey by a deed containing a covenant against this dower right, when no agreement of that character, nor respecting incumbrances of any kind, is expressed, and when in all probability, had such a demand been made of the vendor, he would have refused to comply with it? We think it cannot. The effect of the construction contended for by counsel would be either to attempt to arrive at a sum to be deducted absolutely by a process admittedly speculative, or to suspend the payment of a considerable portion of the purchase money to the grantor during the joint lives of himself and his wife, which it seems to us, could never have been within the contemplation of the parties when this optional contract was signed. Plaintiff was in a court of equity pressing an inequitable demand. We think it was properly refused. On the plaintiff's own construction of the option the Company is in the attitude of one who takes

the promise of another to do that which it is known he cannot perform except by the concurrence of a third person. Such purchaser contracts with full notice of the uncertainty attending the seller's ability to perform, and, not having been misled to his injury cannot now ask the extraordinary aid of a court of conscience in repairing such loss, if any, as he has sustained by the vendor's failure to complete his contract. . . .

## SECTION VII. DEFENSES.

### TUMLINSON v. YORK

(Texas Supreme Court, 1858, 20 Texas 694.)

Hemphill, Ch. J. This was a suit for specific performance of a bond for title to land. It was commenced in the county court, where the prayer for performance was refused. On appeal to the district court, this judgment was reversed, and the cause has been brought by appeal to this court. We are of opinion that there was error in the judgment of the district court. The bond does not recite any consideration. There is no allegation in the petition, that a valuable consideration was paid by the vendee, and although there is no statement of facts, and we cannot ascertain from the record what facts were in proof, yet there being no allegation of the essential fact of valuable consideration, we cannot presume that, in violation of the rules of evidence, such fact was established by proof. The averments and proof must correspond; and this being the rule, we must presume there was no evidence of valuable consideration.

It is a well established rule, that specific performance of an agreement to convey land will not be enforced, unless founded on a valuable consideration. Where the receipt of such consideration is expressed in the agreement, or bond, its existence would be *prima facie* presumed; but where not so expressed, or admitted by the vendor in the pleadings, it must be established by proof; and being a material fact, it

must be averred that the proof may be admitted. Boze v. Davis, 14 Tex. 331; Short v. Price, 17 id. 397. In the latter case, reference was had to art. 710 of the Digest, and it was held inapplicable to cases where the plaintiff must show a valuable consideration as prerequisite to the decree, and where, on principles of equity jurisprudence, the seal imparts no efficacy to the instrument on which the suit is brought; that the only effect of the article would, in such cases, be, that where a valuable consideration is expressed in the instrument, it could not be impeached by the defendant, unless under oath; whereas on general principles of equity, this would not be required. . . .

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## MANSFIELD v. HODGDON.

(Massachusetts Supreme Court, 1888, 147 Mass. 304, 17 N. E. 544.)

Holmes, J. . . . The defendant Hodgdon's undertaking not having been a mere offer, but a conditional covenant to sell, bound him irrevocably to sell in case the plaintiff should elect to buy, and should pay the price within thirty days. The usual doctrine as to conditions applies to such a covenant, and as the covenantor by his own conduct caused a failure to comply with the condition in respect of time, he waived it to that extent. And upon the same principle he exonerated the plaintiff from making any tender when the new terms had been agreed upon, by wholly repudiating the contract. Carpenter v. Holcomb, 105 Mass. 280, 282. Ballou v. Billings, 136 Mass. 307. Gormely v. Kyle, 137 Mass. 189. Lowe v. Harwood, 139 Mass. 133, 136. If it be true, as testified for the defendant, that he also objected to signing a deed conveying the mountain lot, this was a further excuse for the delay. Galvin v. Collins, 128 Mass. 525, 527.

A covenant to sell is not voluntary in such a sense that equity will refuse specific performance. If the defendant conveys, he will get *quid pro quo*.

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## WOOLUMS v. HORSLEY.

(Kentucky Court of Appeals, 1892, 93 Ky. 582, 20 S. W. 781.)

Holt, C. J. . . . In December, 1888, this suit was brought for a specific performance of the contract. The main defense is that

it was procured through undue advantage, and under such circumstances that, in equity, its performance should not be decreed. . . .

There is a distinction between the case of a plaintiff asking a specific performance of a contract in equity, and that of a defendant resisting such a performance. Its specific execution is not a matter of absolute right in the party, but of sound discretion in the court. It requires less strength of case on the side of the defendant to resist the bill, than it does upon the part of the plaintiff to enforce it. If the court refuses to enforce specifically the party is left to his remedy at law.

Thus a hard or unconscionable bargain will not be specifically enforced, nor, if the decree will produce injustice or under all the circumstances be inequitable, will it be rendered. In other words, a court of equity will not exercise its power in this direction to enforce a claim which is not, under all the circumstances, just as between the parties, and it will allow a defendant to resist a decree, where the plaintiff will not always be allowed relief upon the same evidence.

A contract ought not to be carried into specific performance unless it be just and fair in all respects. When this relief is sought ethics are considered, and a court of equity will sometimes refuse to set aside a contract, and yet refuse its specific performance. . . .

The appellee testifies that he did not know anything as to the mineral value of this land when the contract was made; but it is evident he had a thorough knowledge of the value in this respect of lands generally in that section, and of the developments then in progress or near at hand.

All this was unknown to the appellant. It is evident his land was valuable almost altogether in a mineral point of view. While it is not shown what it was worth at the date of the contract, yet it is proven to have been worth in April, 1889, fifteen dollars an acre, and that this value arises almost altogether from its mineral worth; and yet the appellee is asking the enforcement of a contract by means of which he seeks to obtain all the oil, gas, and minerals, and the virtual control of the land, at forty cents an acre. The interest he claims under the contract is substantially the value of the land. Equity should not help out such a harsh bargain.

The appellee shows pretty plainly, by his own testimony, that when the contract was made he was advised of the probability of the build-

ing of a railroad in that locality in the near future. His agent, when the trade was made assured the appellant that he would never be bothered by the contract during his life time. He was lulled in the belief that the Rip Van Winkle sleep of that locality in former days was to continue; and the grossly inadequate price of this purchase can only be accounted for upon the ground that the appellant was misled and acted under gross misapprehension.

The contract was not equitable or reasonable, or grounded upon sufficient consideration, and no interest has arisen in any third party. A court of equity should, therefore, refuse its specific enforcement, but the appellant should have what was in fact paid, with its interest; and when this is done his petition should be dismissed. . . .

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## FLEMING v. BURNHAM.

(New York Court of Appeals, 1885, 100 N. Y. 1, 2 N. E. 905.)

ANDREWS, J. The most serious objection made by the purchaser relates to the sufficiency of the deed of February 14, 1833, from Thomas McKie and Andrew Stark, two of the four executors named in the will of John McKie, to Gerardus De Forest, to pass title to the premises in question. . . .

The purchaser is entitled to a marketable title, free from reasonable doubt. The purchaser bids on the assumption that there are no undisclosed defects. The purchaser pays and the seller receives a consideration, regulated in view of this implied condition. Objections which are merely captious or mere suggestions of defects which no reasonable man would consider, although within the range of possibility or those which are clearly invalid by the law as settled, whatever doubts may at a former time have existed as to the question raised, are not available to a purchaser, and will be disregarded. But the question presented to the court on an application to compel a purchaser on a judicial sale who raises objections to the title tendered to complete the purchase, is not the same as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court and the court has jurisdiction to decide, they are concluded by the judgment pronounced, so long as it stands unrevers-

ed, however imperfectly the evidence or facts were presented upon which the adjudication was made, or however doubtful the adjudication may have been in point of law. If the controversy involves a disputed question of fact, or the evidence authorizes inferences or presumptions of fact, the finding of the tribunal makes the fact what it is found to be for the purpose of the particular case, although the evidence of the fact may be weak and inconclusive, or although it is apparent that there are sources of information which have not been explored, which if followed might have removed the obscurity. The parties are nevertheless concluded in such a case, because they were parties to a judicial controversy before a tribunal constituted for the very purpose of deciding rights of persons and property and before which they had an opportunity to be heard. But the court stands in quite a different attitude, where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact or it may involve a pure question of law upon undisputed facts. In either case it may very well happen that the question is so doubtful that, although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceding to compel a purchaser to take title and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of facts, or a doubtful question of law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication and could raise the same question in a new proceeding. The cloud upon the purchaser's title would remain, although the court undertook to decide the fact or the law, whatever moral weight the decision might have. It would especially be unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented upon the application might be changed on a new inquiry or are open to opposing inferences. There must doubtless be a real question and a real doubt. But this situation existing, the purchaser should be discharged. (Shriver v. Shriver, 86 N. Y. 575, and cases cited; Hellreigel v. Manning, 97 id. 56). . . .

## CRABTREE v. WELLES.

(Supreme Court of Illinois, 1857, 19 Ill. 55.)

Welles and his wife had verbally contracted with Crabtree to sell him a piece of land for one hundred and fifty dollars; fifty dollars was paid at the time of the bargain, and Crabtree was to have a deed when he would pay the other one hundred dollars.

Crabtree tendered the remaining one hundred dollars, but Welles refused to make the conveyance, but prior to the tender of the one hundred dollars, Welles sued Crabtree before a justice of the peace for a debt due him from Crabtree, when the latter attempted to set off against the claim the fifty dollars advanced for the land, but this set-off was not allowed. Crabtree, after having made the tender of the one hundred dollars, as the price of the land, which was refused by Welles, brought an action to recover back the fifty dollars originally advanced. On the trial of the suit for the recovery of this sum, it was attempted to defeat the recovery by showing that a set-off had been attempted in the first suit between the parties, and before the tender of the one hundred dollars. The Circuit Court, Breese, Justice, presiding, gave judgment, upon the finding of the jury for fifty dollars, whereupon Crabtree prayed an appeal. . . .

CATON, C. J. The law is, that one who advances money in part payment of a parol purchase of land, cannot recover it back, till he has offered to fulfill the parol agreement, and the other party has repudiated it by refusing to perform.

If he repudiates it himself, without the default of the other party, he must lose what he has paid. Such parol agreement is not absolutely void, but is only voidable, and is binding on both parties, and may be enforced either in a court of law or equity, unless the statute of frauds be interposed, to relieve the party from his obligations under it. If a party who receives money or its equivalent, under such parol contract, afterwards repudiates it, the law will raise an assumpsit on his part to refund the payment recovered; for he shall not return the money under the contract, while he denies his obligation to perform it, but until he refuses to perform it the law will not imply a promise to refund the payment received under it. Welles, therefore, had no

cause of action against Crabtree for the fifty dollars which he had paid him on the parol agreement until after he had placed himself in a proper position by demanding of Crabtree that he go on and perform the parol agreement upon tendering him the remaining hundred dollars, and Crabtree had thereupon refused to comply. The law cannot presume a promise to refund that money till such refusal has taken place, and, till then, no cause of action existed in favor of Welles against Crabtree on account of that advance. At the time of the trial of the former cause which was relied upon as a bar to this action Welles had not made the tender of the last payment, and Crabtree had not repudiated the parol agreement, so that no liability then existed against him to refund the fifty dollars. The question, then, is, whether his attempt to bring in, and recover it back on the trial of the former action between the same parties, is a bar to this action. On this point there ought not to be any doubt or controversy. At the time of that trial, the money was not due, and for that reason he could not then recover it. The account then presented was, or must be presumed to be, for fifty dollars, then claimed to be due, which he did not and could not prove. This is for fifty dollars not then due, but which has since become due, and consequently, could not be barred by anything that was then due. Suppose on the former trial, Welles had filed, as a set-off, a note executed by Crabtree to him for fifty dollars, which, upon its face, was not due till thirty days thereafter, could it be pretended that the abortive attempt to set it off on the former trial would be a bar to an action upon the note instituted after its maturity? The statement of the proposition is enough to illustrate the utter fallacy of his whole defense. The Circuit Court decided properly, and the judgment must be affirmed.

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## NIBERT v. BAGHURST.

(New Jersey Court of Chancery, 1890, 47 N. J. Eq. 201, 20 Atl. 252.)

GREEN, V. C. The bill of complaint in this action is filed by Francis Nibert against George Baghurst and wife and Francis Phillips, for the specific performance of a contract for the sale of lands and the conveyance of the same according to the alleged terms thereof. . . .

The defendants resist the application for an injunction, on the grounds that the alleged agreement was by parol, and is not enforceable under the statute of frauds, and that it was made on Sunday, and is void under the laws of this state.

The petitioner seeks to avoid the objection based on the provision of the statute of frauds, first, on the ground that there had been such a part performance of the contract as to take the case out of the statute, under the rules which obtain in the courts of equity, and that there was a sufficient memorandum under the statute of this state. . .

The clear weight of the testimony is, that the possession of Nibert, so far from its being by the act or consent of Baghurst and under the agreement was forcible and against his positive and reiterated protest. Possession taken and held under such circumstances can not be construed to be a part performance of the contract. . . .

The equity arising from the expenditure of money in the building of a house is based on the rightful possession by Nibert of the property, and the knowledge of Baghurst and his acquiescence in such acts of assumed ownership.

Equity proceeds on the ground that it would be a fraud for the vendor to allow the vendee to continue in possession and expend his money in improvements, so as to render it impossible for the parties to be restored to their original situations, confessedly on the faith of an agreement of sale, and then try to avail himself of the statute of frauds to avoid the contract. Young v. Young, 18 Stew. Eq. 27, 34; Eyre v. Eyre, 4 C. E. Gr. 102; Green v. Richards, 8 C. E. Gr. 32; Brewer v. Wilson, 2 C. E. Gr. 180, 185; Pom. Cont. § 104; Pom. Eq. Jur. § 1409.

The bare statement of the principle presupposes acquiescence on the part of the vendor, and acquiescence assumes knowledge of the vendee's acts. "For, to constitute fraud, there must coincide, in one and the same person, knowledge of some fact and conduct inequitable having regard to such knowledge." Fry Spec. Perf. § 389.

We have seen that the possession of Nibert was against the wish and warning of Baghurst, and it clearly appears that the latter commenced proceedings in ejectment as soon as he heard the building was being erected. The erection of the house and the possession of the land are both of the same character. They fail as elements of part performance, because done without the knowledge or acquiescence of the vendor. . . .

## MORRISON v. HERRICK.

(Illinois Supreme Court, 1889, 130 Ill. 631, 22 N. E. 537.)

Bailey, J. Regarding the oral contract for a lease as suffficiently proved, the question arises whether such part performance has been shown as will take it out of the operation of the Statute of Frauds. . . .

The evidence shows beyond controversy that the complainants expended large sums of money in making permanent improvements upon the demised premises and in fitting up and furnishing the same for use in carrying on their business, and it is equally beyond controversy that these expenditures were made under and in reliance upon the original contract for a lease for a further term of five years. So far then as the making of valuable improvements can constitute an element of part performance, the complainants have established their right to a decree. It is true the improvements were all made before the term contemplated by the oral agreement was to commence, and while the complainants were in possession under their former lease, but that circumstance does not seem to us to be material, so long as the improvements were in fact made in reliance upon and in pursuance of the provisions of the oral agreement.

The more difficult question relates to the possession which the complainants must establish and rely upon as an act in part performance. It is undoubtedly the rule that acts of part performance, whatever they may be, must refer exclusively to the contract, and be such as would not have been performed but for such contract. They must be such as can not be explained consistently with any other contract than the one alleged, that is to say, they must refer to, result from, and be done in pursuance of such contract. If therefore possession is relied upon as an act of part performance, it must be possession under the contract sought to be enforced. The continuance of possession taken before the contract was made is accordingly not usually held to be sufficient. 2 Reed on Stat. of Frauds, sec. 585. This rule applies especially to cases where the previous holding is under a lease, for as the tenant may lawfully continue in possesion until notice to quit, such continuance in possession is presumptively referable to the lease. It has therefore been sometimes questioned whether, as between landlord

and tenant, part performance is possible. But the better doctrine would seem to be, that one continuing in possesion is at liberty to prove, if he can, that his possession, after the termination of the former lease, is under the oral contract. . . .

In Mundy v. Joliffe, 5 Mylne & Craig, 167, a tenant who went into possesion of premises under a former lease, obtained from his landlord an oral contract for a renewal of his lease for a further term, said contract stipulating, among other things, for the making of certain improvements on the demised premises. The tenant continued in possession, and after the stipulated improvements were made, brought his bill for a specific performance of the contract, and it was held, as a matter about which there could be no doubt, that a sufficient part performance was shown. . . .

Applying this rule to the present case, we are disposed to hold, that, while, prima facie, the complainants, by remaining in possession after the expiration of the term to their former lease, assumed the position of tenants holding over, the presumption that they did so is not conclusive, but is subject to be rebutted by evidence tending to a contrary conclusion. Of this character is the evidence of the expenditures made by them by way of improvements under and in performance of their oral agreement. These expenditures serve to explain and characterize their subsequent holding over after the termination of their former lease. Presumptions are thereby raised which are sufficiently cogent to overcome the ordinary presumption that a tenant holding over does so under his former lease. It is against all ordinary probability that, after having expended $6000 or over in reliance upon and in performance of the agreement for a lease for five years, they were content to assume the attitude of mere tenents holding over, thus placing themselves in a position where their landlord would be at liberty to terminate their tenacy absolutely at the expiration of the first year, and thus deprive them, without the possibility of adequate recompense, of much the larger part of the benefit to be derived from their expenditures. . . .

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## HALE v. HALE.

(Supreme Court of Appeals of Virginia, 1894, 90 Va. 728, 19 S. E. 739.)

Lewis, P. . . . The equitable doctrine of part-performance is also invoked; but as to this, we may say, as was said in a similar case

in Massachusetts, that "there has been no part-performance which amounts to anything." Gould v. Mansfield, 103 Mass., 408. In that case there was, as here, an alleged oral agreement between two sisters to make mutual or reciprocal wills, and each made a will accordingly. Afterwards one of the sisters made a different will, and died. The survivor then filed a bill for the specific execution of the agreement, but a demurrer to the bill was sustained, on the ground that the case was within the statute of frauds.

Notwithstanding the criticism upon that case in the argument at the bar, we are of opinion that it was decided upon correct principles. Not only is it a cardinal feature of a will that it is ambulatory until the testator's death, but acts of part-performance by the party seeking specific execution, to take a case out of the statute, must be of such *an unequivocal nature as of themselves to be evidence of the existence of an agreement;* as, for example, where, under a parol agreement to sell land, the purchaser is put into possesion, and proceeds to make improvements. 2 Min. Insts. (4th ed.), 853; 3 Pom. Eq., sec. 1409. In the language of Lord Hardwicke, the act of part-performance "must be such as could be done with no other view or design than to perform the agreement." Gunter v. Halsey, Amb., 586. "The principle of the cases," said Sir William Grant in Frame v. Dawson, 14 Ves., 387, "is that the act must be of such a nature that, if stated, it would *of itself* infer the existence of some agreement; *and then* parol evidence is admitted to show what the agreement is."

In Phillips v. Thompson, 1 Johns. Ch., 131, Chancellor Kent said: "It is well settled that if a party sets up part-performance to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, that agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case." To the same effect is Wright v. Puckett, 22 Gratt., 370.

This whole subject was very carefully considered, both upon principle and authority, in Maddison v. Alderson, a recent and instructive case in the House of Lords. (8 App. Cas., 467.) In that case the appellant was induced to serve the intestate as his housekeeper without wages until his death by an oral promise on his part to leave her an in-

terest in certain real estate; and he made a will for that purpose, which he signed, but which failed for want of due attestation. Mr. Justice Stephen, before whom the case was tried in the first instance, held that there was a contract which had been partly performed; but on appeal, first to the Court of Appeal, and afterwards to the House of Lords, this ruling was held to be erroneous; and the principle was laid down that an act of part-performance, to take a case out of the statute, must be sufficient of itself, without any other information or evidence, to satisfy the court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

This is so, because, as was said in the same case, the defendant in a suit founded on such part performance is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. Hence, until such acts are shown as of themselves imply the existence of some contract, parol evidence to show the terms of the contract relied on is inadmissible. Browne, Stat. Frauds, sec. 455; Dale v. Hamilton, 5 Hare, 381; Maddison v. Alderson, *supra*.

Now the alleged acts of part performance in the present case, taken singly or collectively, do not bring the case within these principles. The making and preserving the wills, under the circumstances stated in the bill, while they are acts consistent with, are yet not demonstrative of, the existence of any contract between the parties, or, in other words, they do not unequivocally show that there was a contract. *Non constat,* the wills were not made from motives of love and affection, and independently of any contract or agreement; and this being so, parol evidence to establish the alleged contract would not be admissible. . . .

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## CATON v. CATON.

(In Chancery, 1866, L. R., 1 Ch. App. 137.)

Extract from finding of facts by Stuart, V. C:

"What is proved in the present case is that the testator and his intended wife having proposed to make a settlement (the draft of which

was prepared in accordance with that memorandum which is in his own handwriting), changed their intention as to the machinery, and, instead of a settlement, it was proposed, and agreed to by both parties, that the testator, the intended husband, should by will do that which it was originally intended he should do by settlement." . . .

LORD CRANWORTH, L. C. . . . The same clause of the statute which forbids the bringing of an action on any parol contract made in consideration of marriage, also forbids the bringing of any action on any parol contract for the sale of land. But, though Courts of equity have held themselves bound by this last enactment, yet they have in many cases felt themselves at liberty to disregard it when to insist upon it would be to make it the means of effecting instead of preventing, fraud. This is the ground on which they require specific performance of a parol contract for the sale or purchase of land when that contract has been in part performed. The right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract. His Honour the Vice-Chancellor Stuart, according to the report of this case, appears to have thought that the decisions under this head of equity (and they are very numerous) are applicable to the present case, but with all deference to the Vice-Chancellor, I cannot think that this is a correct view of the law.

That marriage itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity.

It was not, however, on the mere fact of the marriage that the Vice-Chancellor rested his judgment. His Honour relied mainly on the circumstance which he considered to have been well proved, that, previously to the marriage, the intended husband, in conformity with the verbal promise he had solemnly made to his wife, prepared a will whereby he gave to her all that he had agreed to give her; and further, that he had executed this will in due form of law immediately after the solemnization of the marriage. I do not however think, even if all this had been clearly made out in proof that it amounts to any part performance so as to prevent the operation of the statute, The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his

position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money. But such cases bear no resemblance to that now under consideration. The preparing and executing of the will caused no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part performance by the party sought to be charged. If I agree with A. by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A to complete the purchase, but it certainly would afford no foundation for a claim by A to compel me to sell on the ground that I had partly performed the contract. The circumstance of the preparing and executing the will (supposing it satisfactorily proved) might afford strong evidence of the existence of the parol contract insisted on, if that were a matter into which we were at liberty to inquire; but it can have no effect as giving validity to an otherwise invalid contract. I must further observe that the nature of the alleged agreement was such as hardly to admit, even on the part of the party to be charged, of anything like part performance. As a will is necessarily until the last moment of life revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a contract of a negative nature—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract. . . .

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## SLINGERLAND v. SLINGERLAND

(Supreme Court of Minnesota, 1888, 39 Minn. 197, 39 N. W. 146.)

Gilfillan, C. J. The parties stand in the relation of father and son. The defendant, the father, owned a large farm in the county of Dodge. On the 5th day of March, 1866, there were pending in the district court in said county five several actions or proceedings,—one an action by plaintiff against this defendant to recover about $15,000, for services rendered between June, 1879, and January, 1886.

. . . These actions and proceedings were all defended, the controversy in each being really between this plaintiff and defendant. They were all on the calendar of the March term, 1886, of the court for trial, and the first was on trial, when on said 5th day of March, 1886, the defendant orally offered to plaintiff that if he would dismiss said actions brought by him, and turn over to defendant said money in the county treasury, he (defendant) would convey said farm to him, with the stock, machinery, and personal property, on the day when he should be married to a certain young lady, to whom he was then, and for some time had been engaged to be married as soon as his pecuniary circumstances would warrant his assuming the support of a family, which engagement, and the reasons for delay in it, were known to and approved of by defendant. Plaintiff thereupon orally accepted said offer, and forthwith dismissed said actions, and withdrew his claim to the money involved in said mandamus proceeding, and such money was thereupon paid over to defendant, and the proceeding dismissed. On the 31st of March, 1886, plaintiff and said young lady were married. From March 5th till some time after the marriage defendant intended to carry out his agreement, but on December 8th, following, on a formal demand by plaintiff for a conveyance, he refused to execute it, and denied any agreement or obligation to do so. . . .

In this case no remedy is apparent that will restore plaintiff to the situation he was in, or put him in as good a situation as he was in, at the time of making the agreement. If the actions and proceedings then pending could be reinstated by vacating the dismissals still plaintiff irretrievably lost the opportunity to try them at the March term, 1886. An opportunity to try them a year or two after that time, when perhaps, plaintiff's ability to present his claims would not be the same, would not be an equivalent for the right to try them at that term. But they could not all be reinstated. The proceeding against the county auditor certainly could not be, nor could a new similar proceeding be instituted. If the bank, relying on the settlement between plaintiff and defendant, and the dismissals of the actions against it, changed its position, so that restoring the actions would operate as a fraud upon it, those actions could not be reinstated; and, for the same reason, new actions for the same causes could not be maintained against it. As to the action against defendant, plaintiff might succeed in having them reinstated, or, if he did not succeed, might bring new actions;

but, in the latter event, a part of the cause of action in one of them would, in the meantime, have become barred by the statute of limitations.

The only other suggestion of a remedy to plaintiff is that he might have brought an action for damages for the loss sustained by his dismissal of the former actions and proceedings. Such an action would be novel, though it might be maintained. The difficulties in the way of prosecuting it, so that the recovery would put him in as good position as he was in before, would be great. He would have to show to what extent he had lost his original claims, and the value of what was so lost. Take the cases against the bank. He would have to show that his rights as against it were gone, and then show his claims against it. And so with the other actions. The dismissals were not made on a money consideration, nor did the parties intend the value of the actions to be measured by a money standard. In no way could the loss of the advantage which the right to try the actions at the March term, 1886, gave him be estimated in damages, nor any recovery he had for it. Among all the cases we have cited, in no one was it clearer than an action for damages was not an adequate remedy than it is in this case. . . .

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## GLADVILLE v. McDOLE.

(Supreme Court of Illinois, 1910, 247 Ill. 34, 93 N. E. 86.)

MR. JUSTICE CARTWRIGHT. . . . The contract was verbal, and in such a case it must be proved by competent evidence and be clear, definite and unequivocal in its terms. (Clark v. Clark, 122 Ill. 388.) The evidence fully satisfied that requirement. It was also proved, and not contradicted, that Eva Gladville fully performed the contract in accordance with its terms, and the only question to be determined is whether she is entitled to a specific performance of it although it was within the Statute of Frauds and invalid at law. The invalidity consisted of the fact that it was not reduced to writing and signed, and no action at law will lie upon such a contract. The courts of equity, however, will not permit the Statute of Frauds, the only purpose of which is to prevent fraud, to be used where the effect will be to ac-

complish a fraud and where a verbal contract has been performed, either fully or in part, by the party seeking the remedy, and the facts are such that it would be a virtual fraud to permit the defendant to interpose the statute, a court of equity will not listen to that defense. If the defendant has knowingly permitted the complainant to do acts in performance of the verbal agreement and in reliance upon it, which change the relation of the parties and prevent a restoration to their former condition by a recovery at law of compensation for the acts performed, it would be a fraud on the complainant to permit the defense to be made, and the statute, which is intended to prevent fraud, would be made the means of fraud. In equity the rights and duties of the parties are the same as they would have been if the contract had been written and signed, and unless the one who has performed the contract in good faith can be made whole in damages he is left without any adequate remedy at law, and equity will compel the other party to do the thing which was agreed to be done. (3 Pomeroy's Eq. Jur. sec. 1409; 26 Am. & Eng. Ency. of Law,—2d. ed.—50.) Payment of purchase money, alone, will not take the contract out of the statute, for the reason that it can be recovered back, with interest, in an action at law. (Temple v. Johnson, 71 Ill. 13.) The same is true of personal services, which can be estimated in money, for which a recovery can be had in law, because the law would in that case afford a sufficient remedy. In this case there could be no recovery at law for the labor, sacrifices and deprivations of Eva Gladville during ten years of service, which were worth as much as the land was then worth, for the reason that any claim for them was outlawed by the Statute of Limitations long ago. The mere fact of possession, without other circumstances, would not justify a decree for a specific performance, and in most cases the use of the land would be a full compensation for all injuries sustained. The basis for relief in a court of equity is the equitable fraud resulting from setting up the Statute of Frauds as a defense, and there have been many cases in this court where equity has afforded a remedy by specific performance if the contract has been performed by one party in such a way that the parties cannot be placed in statu quo or damages awarded which would be full compensation. In contracts between parties for the conveyance of land there is usually a provision for possession under the contract at some time, and naturally one of the most frequent acts of part performance is taking

possession and making improvements on the land. This court has enforced specific performance of verbal contracts where such possession has been taken, coupled with payment of the purchase price, and especially if lasting and valuable improvements have been made. (Ramsey v. Liston, 25 Ill. 114; Langston v. Bates, 84 id. 524; Smith v. West, 103 id. 332; McNamara v. Garrity, 106 id. 384; Irwin v. Dyke, 114 id. 302; Hall v. Peoria and Eastern Railway Co. 143 id. 163.) And a contract invalid at law may be specifically enforced against the heirs of a party to such contract. Simonton v. Godsey 174 Ill. 28.

Much of the argument against the right to a specific performance is devoted to the claim that Eva Gladville did not have possession of the land in the lifetime of John P. Jester or Phebe Jester, and that there can be no decree for specific performance without such possession. The keys were delivered to her by Phebe Jester a few days before the death of Phebe Jester, and she was put in such possession of the property as was consistent with existing conditions and circumstances. But if there was no actual possession and it was merely constructive, it cannot be that equity will deny a remedy upon that ground, alone, where the result would be to accomplish a fraud. The cases where possession has been regarded as of controlling importance are cases where the purchaser became entitled to posession under the terms of the contract, but in this case Eva Gladville was not entitled to possession in the lifetime of John P. Jester or Phebe Jester but by the very terms of the contract was to have such possession after they died, and she took and has held actual possession ever since the death of Phebe Jester. To say that possession in the lifetime of the other party by one claiming under a verbal contract is indispensable to any remedy in equity, would be to say that there can be no remedy where the complainant did not become entitled to possession until the death of the other party, although such a rule would operate as an unmitigated fraud. The ground for interference by a court of equity being that there have been such acts of performance on the part of one claiming the benefit of the contract as would compel him to suffer an injury amounting to a fraud if the statute is interposed as a defense, it would be as anomalous as it would be absurd to recognize nothing as performance except taking possession of the land when a party could not lawfully take such possession. To permit the defendants to the bill of Eva Gladville to repudiate the contract because she did not have

possession before she became entitled to it, when she has performed her contract and cannot be compensated except by an enforcement of it, would be to perpetrate a fraud equal to any other. . . .

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## YOUNG v. OVERBAUGH.

(New York Court of Appeals, 1895, 145 N. Y., 158, 39 N. E. 712.)

GRAY, J. The plaintiff brought ejectment to recover the possession of land and a dwelling thereon, occupied by the defendant and her husband. It was conceded that the legal title was in plaintiff's testator, at the time of his death; but the defendant claimed that she was the owner of the equitable title to the premises, by reason of promises made by the plaintiff's testator to her and of acts done by her in reliance upon those promises. . . .

In 1872, Thomas Cornell, the plaintiff's testator, was the owner of the premises in question. He was the half-brother of the defendant and upon his request she and her husband had settled in the city of Kingston. In the year mentioned, Mr. Cornell asked the defendant's husband to build a house for the defendant on a certain piece of his property, at the cost of $4500, and to bring the bills to him for payment. The house was built at a cost which exceeded, by about $1,200, the sum named by Mr. Cornell, and the defendant subsequently, made valuable permanent improvements upon the property; such as building a barn, planting of fruit trees, putting in a heating apparatus, etc.: of all which Mr. Cornell had knowledge. Other facts found were that, after the defendant had contracted to erect a house upon the property, Mr. Cornell had stated that the house was built for the defendant and was hers; and so spoke of it to different persons at different times. Upon one occasion, in the year 1876, upon the defendant's husband informing Mr. Cornell that he had found a business at Yonkers, which he thought it would be a good thing to go into, the latter replied, to the effect, that if they moved away from the property where they then resided the defendant should not have it and that they would lose it. There was this specific finding: "That such improvements, as well as the payment of $1,200, were made and expended on the faith of the promises

by Cornell, to give the property to Mrs. Overbaugh (this defendant), and all such moneys were expended, and improvements made, for and on behalf of the defendant and at her request, and under her promise to repay her husband thereafter." There was a finding that the total amount of money expended by the defendant for permanent improvements, repairs, taxes, insurance, etc., and including, also, repairs and expenses, which are incidental to the ordinary care of a house, from the beginning of the erection of the house down to the date of the trial, was the sum of $4,734.26 and that the fair rental value of the property of the defendant during her occupancy, for a period of about twenty years, was $250 per year; amounting in the aggregate to $5,000.

The learned trial justice conceded the existence of the exception to the general rule, that a parol gift of real estate is void, in a case where the donee enters into possession of and improves the property, upon the strength of the promise that it would be given to her; but he did not think that the present case fell within the exception. He was influenced in that view by a consideration of the nature of the acts done by the defendant, in reliance upon the promise of Mr. Cornell. Regarding the equitable rule to be founded in the idea of preventing an injustice being done to a promisee, if the promisor be permitted to avail himself of the statute, and that the application of the rule is in a case where financial injury will be sustained; he, in the first place, considered that as the defendant's acts were only such as an ordinary householder would be expected to make and, in the second place, as the fair rental value of the premises during the twenty years of the defendant's occupation was worth to her, altogether, a sum which exceeded the aggregate of the sum found to have been expended by her, or at her request, during that time, that if the defendant was compelled to surrender possession of the premises, she would not, in fact, be a loser as the result of the entire transaction with Mr. Cornell, but the gainer. Hence he concluded that there was absent here that element of injustice to the donee; which is essential to exist, in order to entitle him to an enforcement of the doner's promise.

We find ourselves unable to agree with the trial justice in his judgment upon this question and we prefer the view taken at the General Term; that where there has been a parol promise to convey,

a taking of possession under such promise and the making of permanent improvements upon the property upon the faith thereof, the mere value of the occupation during the time is not to be set off against the expenditures made. I think it would not be within the spirit of the rule in equity that its application should be made to depend, not upon the fact of a consideration for the promise being shown to have existed and to have been performed, but upon the question whether, when specific performance by the donor is claimed, the use has not compensated the donee and relieved the donor's obligation. . . .

In such a case as this, to constitute a good consideration in equity, it is, of course, essential that it be substantial; in the sense that the promise shall rest upon a performance by the promisee, which evidences acceptance of and reliance upon the promise and consists in expending moneys in permanent improvements upon the land. In this case it may well have been, as found, that some of the expenditures made by the defendant upon the property were such as a householder would ordinarily make, or were trivial in their nature; but they do not influence the character of the others. We have the fact that the house was contracted for upon the promise of Mr. Cornell; that its cost exceeded the sum, which he agreed to be responsible for, by $1,200, and that there were the other improvements of a permanent character, to which I have adverted as being found. There was, in fact, such a consideration for the promise of Mr. Cornell as to have made it obligatory upon him to perform it, in order that the defendant should not be defrauded and injured. It would be very inequitable to deprive the agreement of its obligatory character, merely because, during the time of the occupation of the defendant under the parol promise, the fair rental value of the premises would amount, in the aggregate, to a sum in excess of the amount altogether expended. If there was the promise to give the property, accompanied by the delivery of possession to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance. . . .

## GIRARD v. LEHIGH STONE CO.

(Illinois Supreme Court 1917, 280 Ill. 479, 484, 117 N. E. 698.)

Mr. Justice Duncan. . . . The agreement by which appellee claims an easement across appellants' land was a verbal agreement. It is well settled that an easement or other incorporeal hereditament in lands cannot be created by parol but only by grant, or by prescription, which presumes a grant. (Lake Erie and Western Railroad Co. v. Whitham, 155 Ill. 514.) At law a parol license is revocable though a consideration has been paid or expenditures have been made on the faith of the agreement. (St. Louis Nat. Stock Yards v. Wiggins Ferry Co. 112 Ill. 384; Tanner v. Volentine, 75 id. 624.) Courts of equity, however, will interfere to restrain the exercise of a legal right to revoke a license on the ground of preventing fraud and will construe the license as an agreement to give the right. (Jones on Easements, sec. 76; Hunt v. Sain, 181 Ill. 372; Kamphouse v. Gaffner, 73 id. 453.) Appellants went into the circuit court by bill in equity to enjoin the doing of the very thing they had agreed appellee should do, according to the finding of the circuit court. Appellee had expended large sums of money on the faith of their agreement, and it would amount to a fraud on appellee to permit appellants to thus undo their agreement. They are asking equity but at the same time are not offering to do anything to make appellee whole on its expenditures. . . .

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## JOHNSON v. HANSON.

(Supreme Court of Alabama, 1844, 6 Ala. 351.)

Assumpsit by the plaintiff, against the defendant in error.

The two first counts of the declaration, set out a sale of land by the plaintiff to the defendant, at the price of eight hundred dollars, to be paid, one half on the first of January, 1839, and the remainder on the 1st January, 1840—that the defendant went into peaceable possession of the premises, and has hitherto retained it, and that the defendant

has paid three hundred dollars, part of the purchase money—that the plaintiff is able and willing, and ready to make title according to his contract, upon the payment by the defendant, of the purchase money, and concludes with the usual super se assumpsit.

The defendant demurred to these counts of the declaration, and judgment being rendered on the demurrer, for the defendant, and the plaintiff declining to plead over, judgment was rendered against him. . . .

Ormond, J. It is not in general, necessary to allege in a declaration, a written promise, where the necessity for the promise being in writing, is created by statute, as it is matter of evidence to be proved at the trial, but in this case, it is expressly alleged that the contract for the sale of the land, which was the consideration of the promise laid in the declaration, was merely verbal, and the precise question is, whether an action can be maintained at law, to recover the purchase money of land, there being no note or memorandum thereof in writing, because the vendee retains the possession.

A court of chancery acting on its own peculiar rules, will, in certain cases, for the prevention of fraud, enforce a specific performance of a verbal contract for the sale of land; as where there has been a part performance of the contract, but we are not aware that such a power has ever been acknowledged to reside in a court of law. Doubtless some isolated cases may be found, in which it has been held that the equitable circumstances which would authorize a court of chancery to grant relief, might be considered in a court of law.

Lord Redesdale remarks, "Mr. Justice Buller says, in one or two cases, that part performance will take a case out of the statute, as well at law as in equity. This opinion will be found wrong; and I recollect Mr. Justice Buller, on being pressed with the consequences of that opinion, in case of a demurrer to evidence, being obliged to abandon the position. The ground on which a court of equity goes in cases of part performance, is that sort of fraud which is cognizable in equity only." O'Herliky v. Hedges, 1 S. & L. 130. . . .

The recent decision of Cope v. Williams, 4 Ala. 364, has been pressed on the court, as tending to a contrary conclusion. In that case, the vendee in possession, brought an action to recover back the purchase money. This court held, that it was contrary to equity and good conscience, to permit him to assert the invalidity of a contract,

by virtue of which he retained the possession of the land; the vendor being willing to execute the contract.

The difference between that case and the present is, that here the vendee repudiates the contract, and if he retains the possession of the land, it is not by force of the contract, which at law can confer no rights on either party, but because the vendor chooses to acquiesce in it.

Whatever may be the rights of these parties in a court of equity, it is certain no right can be derived by either in a court of law, from a contract declared void by statute.

Let the judgment be affirmed.

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## WOOD v. MIDGLEY.

(In Chancery, 1854, De G., M. & G., 41.)

This was an appeal from the decision of Vice-Chancellor Stuart overruling the demurrer of the defendant to a bill for specific performance filed by vendors of leasehold property. The ground of the demurrer was that the bill alleged no sufficient agreement in writing within the Statute of Frauds. . . .

TURNER, L. J. . . . As to the second point, it is said that a defense founded on the Statute of Frauds cannot be taken by way of demurrer, because the statute does not destroy a parol contract, but only prevents the enforcement of a contract unless it is evidenced by an agreement signed by the party to be charged; and a distinction was attempted to be drawn on this ground between the Statute of Frauds and the Statute of Limitations. But I cannot see any distinction between them for this purpose, because the Statute of Limitations does not destroy a debt any more than the Statute of Frauds destroys a contract. On the same principle it must rest on the plaintiff to allege a state of facts, in each case, taking it out of the operation of the statute. Both cases depend on the same principle, which is, that it is incumbent on the plaintiff to state facts entitling him to equitable relief. (See 1 Dan. Ch. Pr. [4th Am. ed.]365. In Foster v. Hodgson, 19 Ves. 180, 184, Lord Eldon said, "I was present, and I believe counsel in the cause of Beckford v. Close; and I am sure

that Lord Kenyon, upon the doctrine he then held, thought that advantage might be taken of a case of this sort by demurrer; asking, if a plaintiff states upon his bill a case, on which the defendant may insist that the remedy shall be taken away, why may he not do so by demurrer?" It seems to me, therefore, that a defense resting on the Statute of Frauds may be made by demurrer.

Upon the merits the argument is threefold. First, it is said that the defendant has so acted as to avoid signing the agreement, holding the other party bound by the agreement, and Maxwell v. Mountacute, Prec. in Ch. 526, is referred to on this head. But the principle of that and similar cases is fraud. If a party has been guilty of fraud, beyond all doubt the Court will not let him take advantage of the Statute of Frauds. All the cases referred to, including Hammersley v. De Biel, 12 Cl. & Fin. 45, Walker v. Walker, 2 Atk. 98 and Muckleston v. Brown, 6 Ves. 52, rest on this principle. Is there, then, a case alleged by this bill of this nature, that the defendant did by his fraudulent act prevent the agreement from being reduced to writing. I think that there is no allegation on the bill bringing forward a case of fraud. The case alleged is simply this, that there was an agreement for a sale by the plaintiffs to the defendant for £1,000, and that defendant said that he would not sign any agreement. The law has said that the defendant is not to be sued unless upon an agreement signed by him. Is it a fraud on that law for him to say, I have agreed, but I will not sign an agreement? . . .

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## GREEN v. GREEN.

(Kansas Supreme Court, 1886, 34 Kan. 740.)

Horton, C. J. Harriet F. Wilcox, being the owner of certain real estate, and about to be married to Oliver Green, signed and executed deeds of all of her real estate to her children the day before her marriage. The deeds were made without the knowledge or consent of her intended husband, and for no other consideration than love and affection. The grantees of Harriet F. Wilcox, now Harriet F. Green, executed deeds to the property to James H. Easterday, who at the time had knowledge of all the circumstances attending the execution of the deeds to them. Oliver Green, the husband, attempts to set

aside these deeds, alleging that the same are fraudulent as to him. The defendant, James H. Easterday, demurred to the petition of plaintiff, on the ground that it did not state facts sufficient to constitute a cause of action. . . .

For the purpose of this case, all the allegations of the petition must be taken as true. Therefore we must assume there was a verbal ante-nuptial contract existing between Oliver Green and Harriet F. Wilcox at the time of their marriage; that the marriage was consummated by Green on account of his reliance upon the ante-nuptial contract; and that Harriet F. Wilcox, now Green, has been guilty of misrepresentation, deception and actual fraud toward Oliver Green before and after her marriage. The question is, whether, under all these circumstances, the deeds delivered subsequent to the marriage can be set aside as fraudulent to the husband. We decided in Hafer v. Hafer, 33 Kans. 449, that—

"The statutes of this state recognize the right of parties contemplating marriage to make settlements and contracts relating to and based upon the consideration of marriage, and that an ante-nuptial contract providing a different rule than the one prescribed by law for settling their property rights, entered into by persons competent to contract, and which, considering the circumstances of the parties at the time of making the same, is reasonable and just in its provisions, should be upheld and enforced."

And we further decided that "Marriage is a good and sufficient consideration to sustain an ante-nuptial contract." Sec. 6, of chapter 43, Comp. Laws of 1879, of the statute for the prevention of frauds and perjuries, provides:

"No action shall be brought . . . to charge any person upon any agreement made upon consideration of marriage, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

But for this statute, we suppose it would be conceded that the ante-nuptial contract might be enforced, or at least that the deeds of Harriet F. Green, late Wilcox, attempting to convey, without consideration, all of her real estate, so as to deprive herself of the

power of carrying out her promises and contract, would be invalid as a fraud upon her husband. . . .

In Glass v. Hulbert, 102 Mass. 24, it was said:

"The marriage, although not regarded as a part performance of the agreement for marriage settlements, is such in irretrievable change of situation that if procured by artifice upon the faith that the settlement had been, or the assurance that it would be executed, the other parties are held to make good the agreement and not permitted to defeat it by pleading the statute."

In Petty v. Petty, 4 B. Mon. 215, the wife, in her petition charged that her husband, being much the elder and in good circumstances, as an inducement to the contract of marriage and as a means of providing for her support in the event of his death, before their marriage promised her that if she would marry him he would immediately after the marriage make a deed of settlement, etc. A few days after the marriage, her husband disclosed to her for the first time that he had been induced by certain persons to make over his property before he married. The court said, in passing upon the case, that "the wife has been fraudulently deprived of the right of dower by the deeds in question; to that extent at least of this interest, if no further, their execution was a fraud upon her and ought not to stand." . . .

Upon the well-established doctrine that fraud takes any case out of the statute of frauds, and the principle declared in Busenbark v. Busenbark, we conclude that the deeds in controversy are in fraud of the rights of the plaintiff, and that he is entitled to have them set aside. . . .

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## DUFFY v. KELLY.

(New Jersey Court of Chancery, 1897, 55 N. J. Eq. 627, 37 Atl. 597.)

The suit is in the nature of one for specific performance. The complainant, by his bill, sets out that he is the owner of a lot of land in Hoboken, known as No. 165 Newark street, and that on the 2nd of October, 1891, he demised the same unto one Adolph Horn, for the term of five years from that day, and the lease contained a clause

in these words: "And it is further agreed that the tenant shall have the option of extending this lease for the further period of five years for the same rent, unless the landlord shall pay a fair price for the building that is to be put on the premises by the tenant, provided three months' notice in writing is given by either party before the expiration of this lease." . . .

Pitney, V. C. . . . The clause in question is, in effect, a contract on the part of the lessee to convey the building to the complainant, lessor, at his option, at a fair price. This is a necessary implication from the scope and purpose of the contract. If the building was, in fact, so annexed to the land as to be incapable of removal as a trade fixture, then the legal title was in the lessor and no actual conveyance is necessary. If, on the other hand, the lessee has the right to remove it, a formal release of that right is proper. The clause was evidently framed upon the idea that it was not removable, and the provision for compensation was manifestly introduced for the benefit of the lessee by way of protecting him against the loss of the amount invested in the building. It follows that the suit is, in effect, one for specific performance.

The circumstance that the interest here in question may be properly classed as a chattel interest is no objection to the jurisdiction of the court. The power and propriety of the court, in proper cases, to deal with specific performance of contracts for the sale of chattels is established by a series of authorities in New Jersey, the leader being Cutting v. Dana, 10 C. E. Gr. 265, followed by Rothholz v. Schwartz, 1 Dick. Ch. Rep. 477, and by the later case of Gannon v. Toole, 32 Atl. Rep. 702. In the last case, the interest dealt with was much like that now before the court.

But, in essence, the subject-matter here is real estate. It involves the right to the possession of the land itself, as well as of the building which has been erected upon it.

Then I am unable to see how the complainant can have his remedy at law. By his notice given to Kelly, he bound himself to purchase the building at a fair price, and barred himself from declaring the term ended except upon terms of paying for the building. In order to maintain an action at law, it is necessary for him to make a tender of a fair price in advance of his action. And there are two difficulties in the way of that—first, that he has no mode of ascertaining in ad-

vance what a jury will consider to be a fair price, and second, he might not be quite safe in tendering it to either of the two—Kelly, the assignee of the lease, or to the Bavarian Brewing Company, as mortgagee.

The real position of the complainant is that of a person holding a contract to purchase a right of possession of land upon paying a fair price for a building situate upon it. In that respect the case is the converse of Berry v. Van Winkle, 1 Gr. Ch. 269, where the aid of the court was asked by the lessee, who had a contract from the lessor to pay him, at the end of the term, the value of improvements to be put upon the premises.

Viewed in the light of a suit for specific performance, the power and duty of the court, where, as here, it is necessary, in order to do justice, to ascertain the fair value of the subject of the sale, must be considered as settled in this court. The subject was considered by Chancellor Green in Van Doren v. Robinson, 1 C. E. Gr. 256 (at p. 260), where that learned judge collected the authorities and stated the result thus: "But where the contract is that the land shall be reconveyed, not at a price to be agreed upon by the parties, but at a fair price, or at a fair valuation, the court would direct the valuation to be made by a master, and will enforce the execution of the contract."

It is manifest that, unless the court will undertake to ascertain the fair value of the building, the complainant will be in great danger of losing the benefit of the terms of his contract, and that consideration has influenced the courts in the direction of assuming that duty whenever practicable. This abundantly appears from an examination of the later English authorities. Pom. Spec. Perf. § 151; Fry Spec. Perf. (3rd Am. ed.) § 346; Hopcraft v. Hickman, 2 Sim. & Stu. 130; Gaskarth v. Lord Lowther, 12 Ves. 107; Jackson v. Jackson, 1 Sim. & G. 184; 22 L. J. Ch. (N. S.) 873; Milnes v. Gery, 14 Ves. 400.

The latter was an action for specific performance of a contract to sell an estate at a price to be fixed by two indifferent persons, one to be named by one party and the other by the other party, and if the persons so named should happen to disagree, then these two to choose a third person, whose determination should be final. Two persons were chosen, but were unable to agree, and were unable to agree upon a third person. Complainant filed a bill for specific performance,

asking the court to appoint a proper person to make the valuation, or that the valuation should be ascertained in such other manner as the court should direct. Sir William Grant, master of the rolls, held that the court had no power to fix the price in any other manner except in that mode fixed by the parties, but at page 407 he adds: "The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value were pointed out. There is nothing, therefore, precluding the court from adopting any means adapted to that purpose."

With regard to the value of the building here in question, I think a fair valuation will be arrived at by taking the actual cost of the building and water and sewer connection, which was $611, and make a moderate allowance for five years' wear and tear. This I fix at $61 and fix the valuation at $550.

As the complainant made his offer too small and the defendant his demand too large, I think it right that each party should pay his own costs.

The decree will be that, upon tender of that sum, the defendant must release all right, title and interest in the premises, without prejudice to the right of the complainant to recover for use and occupation.

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## BODWELL v. BODWELL.

(Supreme Court of Vermont, 1894, 66 Vt. 101, 28 Atl. 870.)

Ross, C. J. This is a bill brought by the guardians of the minor children of E. B. Bodwell, deceased, praying to have Ida A. Bodwell, the widow of the deceased, compelled, specifically, to perform a postnuptial agreement entered into by her, while covert, with the deceased, in regard to living separate and apart from the deceased, and relinquishing "all right, title, and interest in and to his property and estate." The orators, as the representatives of the minor children, stand upon the rights of E. B. Bodwell, as they existed at the time of his decease. Without attempting to determine whether the contract is such that equity would specifically enforce it under any circumstances, or whether it is fair and just in its provisions for the

defendant, or whether its proper construction would debar the defendant of homestead and dower, and other provisions of the statute for her benefit, in his estate, it is elementary that "he who seeks equity must do equity," or that a party to a contract, or those standing on his rights, to entitle himself to a specific performance of the provisions of the contract which are to be performed for his benefit, must affirmatively establish that he has faithfully kept and performed, or is ready and willing to keep and perform, all the provisions of the contract resting upon him to perform, for the benefit of the other party. The deceased had not kept and performed one of the essential provisions of the contract which rested upon him to perform. By the contract, the defendant Ida A. Bodwell was given the care and custody of their minor son Burleigh W., so long as she should properly provide and care for him. The master has found that she did properly provide and care for him, and that the deceased did not regard this provision of the contract, but, very soon after it was entered into, against her wish, stealthily took the son from her, and not only detained him from her so long as he lived, but in the meantime brought a bill of divorce against her, and therein prayed to be given the custody of the son. He put her to the trouble and expense of defending herself, not only from the charges in the libel, but also from the obtaining a decree for the custody of the son. Under these circumstances, E. B. Bodwell, at the time of his decease, did not stand in such relations to the contract that he could call upon a court of equity to enforce it specifically in his favor. Neither do the orators, who stand on his rights. Decree reversed, and cause remanded, with a mandate to the court of chancery to dismiss the bill, with costs to the defendant in this court.

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## BUCKLAND v. HALL.

(In Chancery, 1803, 8 Ves. 92.)

In May, 1798, the plaintiff being in possession as assignee of a house belonging to the defendant, in Duke Street, Lincoln's-Inn-Fields, at a rent of £30 per annum, to expire at Midsummer, 1799, a treaty was entered into and concluded for a renewal; and a minute of an

agreement was written by the defendant for a lease at the rent of £35. The defendant to make certain alterations: the plaintiff to do all substantial repairs by the 24th of June, 1801, and the painting etc., by the 24th of June, 1802; then to have a lease signed for seven, fourteen, or twenty one years, at his option, from midsummer 1800. . .

THE LORD CHANCELLOR (Eldon). In a case of this kind the court must take care that, the tenant is not rashly turned out of possession. On the other hand it is too hard against the landlord, to introduce upon the record an averment, that the tenant has some way or other become solvent. With respect to the insolvency, the weight of that objection is more or less in different cases. There is a distinction certainly between a purchase and a lease. In the former instance the bill for specific performance tenders payment of the purchase-money; the latter is very much otherwise; and the court ought not to forget the habit of dealing among mankind with regard to the relation of landlord and tenant. Every man taking a tenant looks to the probability of the rent being paid; and that attention is paid to that circumstance through the whole currency of the lease, that introduces a provision not to assign or underlet without license; and that is often thought of so much consequence, that special care is taken at least as to the end of the lease, that there shall then be a responsible tenant; though it may not have been thought necessary to provide for that in the anterior period. A difference of opinion has, I know, prevailed, whether that is a usual covenant, to be inserted as such, or not. But recollecting, that the lessee remains liable to the determination of the term, but an assignee only during his possession, it is of great importance to the lessor to take care that the lessee shall be a man of substance. Therefore insolvency admitted, and not cleared away, is a weighty objection to a specific performance of an agreement for a lease: the party here seeking an execution beyond the law. Insolvency would be of weight with a jury. Such a question appears never to have been determined; and is of too much consequence to be decided upon motion. I shall therefore only say, that at the hearing in general cases, it would have considerable weight with me, in some cases more than in others. If the tenant undertakes for nothing but the payment of rent, it must be appreciated accordingly. If beyond that he undertakes for considerable expenditure upon the premises, before he is to be placed in the relation of lessee, that is directly

connected as a most important circumstance with the fact of solvency or insolvency. Therefore, where very considerable repairs are to be done by the lessee, his solvency is to be looked to to that extent; for, unless done, before the bill is filed, they are to be done after the decree; not immediately upon tender, as in the case of a purchase; unless the bill can offer the amount of the utmost possible repairs to be paid into court. . . .

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## THOMPSON v. WINTER.

(Minnesota Supreme Court, 1889, 42 Minn. 121, 43 N. W. 796.)

Gilfillan, C. J. This is an action to compel specific performance of a contract in the nature of one to convey real estate. The defendant had purchased the land from the state, paying 15 per cent. of the purchase price, and receiving certificates of purchase. February 1, 1886, these parties entered into a contract in writing, whereby defendant agreed that, upon full performance on the part of the plaintiff, he would transfer by deed of assignment the said land certificates. Plaintiff was to pay therefor $590, according to two promissory notes,—one for $190, due October 1, 1886, with interest at 10 per cent., and one for $400, due two years from February 1, 1886, with interest at 8 per cent.,—and pay all taxes and assessments, and the unpaid purchase-money to the state. The plaintiff fully performed this contract on his part. In March, 1886, the parties made an oral agreement, by which defendant agreed to make certain improvements for the plaintiff on the land, by breaking, erecting buildings, and digging a well, for which plaintiff agreed to pay him the cost thereof, with interest; such payment not to be made before the expiration of five years from the time of making the improvements. Afterwards, pursuant to such agreement, defendant made such improvements to the amount of $500, no part of which has been paid. The plaintiff was insolvent. On these facts the court below denied specific performance.

From the memorandum filed by the court below it appears that the specific performance was refused, in the exercise of what the court deemed as discretionary power, the reasons for so exercising

that power being stated that plaintiff has become insolvent; that the value of the improvements is equal to the purchase price; and that plaintiff can be compensated in damages. The mere fact that a person has a contract for the conveyance to him of real estate does not entitle him, as of right, to the interposition of a court of equity to enforce it. The matter of compelling specific performance is one of sound and reasonable discretion,—of judicial, not arbitrary and capricious, discretion. There must be some reason, founded in equity and good conscience, for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it. In this case there is no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages, although a reason for not holding what he has done to be part-performance to take the case out of the operation of the statute of frauds, is of itself no reason for withholding the proper remedy, where the contract is valid under the statute. The order is re-

versed, and the court below will enter judgment on the findings of fact in favor of plaintiff for the relief demanded in the complaint.

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## PYATT v. LYONS

(New Jersey Court of Chancery, 1893, 51 N. J. Eq. 308, 27 Atl. 934.)

ABBETT, J. The bill in this case was filed for specific performance of a contract for the sale of lands. . . .

In this case, if the contract is to be enforced, the complainant was entitled, in equity, to a conveyance of a lot on the corner of Nassau and Witherspoon streets, in Princeton, twenty-two feet six inches wide and one hundred and twenty-nine feet deep, and he was not entitled, in equity, to the "narrow strip" of three feet eleven inches, which was part of Witherspoon street.

The learned vice-chancellor reached this conclusion, and determined correctly upon the evidence in this case, that this complainant never had any right, in equity, to have a conveyance of a lot of more than the twenty-two feet six inches in width. The defendants offered to convey such a lot, and twice, once in May and again in September, 1892, tendered the deed of March 28th, 1892, containing a proper description of a lot twenty-two feet six inches wide by one hundred and twenty-nine feet deep, on the corner of Nassau and Witherspoon streets. The complainant refused to take any deed unless it gave him a lot twenty-six feet five inches in width, and refused to pay the balance of the purchase money unless he got a good title to such a lot as would include the "narrow strip" of land in Witherspoon street.

The relief invoked is not a matter *ex debito jusitiae;* the bill for specific performance is addressed to the extraordinary jurisdiction of a court of equity to be exercised according to its discretion, and he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part. Meidling v. Trefz, 3 Dick. Ch. Rep. 644; Page v. Martin, 1 Dick. Ch. Rep. 589; Blake v. Flatley, 17 Stew. Eq. 231.

The complainant has not presented a case which brings him within the above rules, and no case has been shown where a court of equity

decreed specific performance after such a refusal as complainant admits in this case. He refused to perform the contract on his part, unless the defendants would do what in equity they were not bound to do.

The complainant cannot, after such a refusal, and after the defendants have sold the premises to another, seek in a court of equity the relief prayed for in this suit. He must be left to his remedy at law. . . .

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## BISHOP v. NEWTON.

(Illinois Supreme Court, 1858, 20 Ill. 175.)

WALKER, J. . . . Then has complainant a right to insist upon a specific performance of the agreement? This breach of equity jurisdiction is regulated, to a considerable extent, by a sound legal discretion. The rule governing courts was stated by Chief Justice Marshall to be, that when a bill is exhibited by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances; and that a consideration always entitled to great weight is, that the contract, though not fully executed, has been in part performed. 6 Wheat., 528. And, in a subsequent case, the same court lay down the rule that time may be of the essence of the contract for the sale of property. It may be made so by the express stipulation of the parties, or it may arise by implication, from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been exceedingly negligent in performing the contract on his part, or if there has been, in the intermediate period, any material changes of circumstances affecting the rights, interests or obligations of the parties; in all such cases, a court of equity will refuse to decree a specific performance, upon the plain ground that it would be inequitable and unjust. But, except under circumstances of this nature, time is not treated by courts of equity as of the essence of the contract, and relief will be decreed to the party who seeks it, if he has not been grossly negligent, and comes within a reasonable

time, although he has not strictly complied with the terms of the contract. Taylor v. Longworth et al., 14 Pet., 172.

The complainant has brought himself clearly within the principles of these rules. He, in part performance of the contract, paid, on the purchase, one thousand dollars. It is true, he did not pay or offer to pay the next installment on the day, but he did offer to pay twenty days afterwards. While this is not a strict compliance, it is not gross laches or unreasonable delay, when it is remembered that Newton was himself in default, and not in a position to require payment, and we are, therefore, of the opinion that his conduct was such as entitles him to the relief sought. . . .

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## POMEROY v. FULLERTON.

(Supreme Court of Missouri, 1895, 131 Mo. 581, 33 S. W. 173.)

MACFARLAND, J. The suit is in equity, to enforce the specific performance of the following contract: . . .

Some time previous to this transaction defendant had purchased a large tract of land in the suburbs of the city of St. Louis, of which that in question is a part, for which he agreed to pay the sum of $80,000. A part of the purchase price was about maturing and defendant was much in need of money to meet these obligations. The land in question was at the time worth more than under the contract plaintiff agreed to pay for it. Defendant agreed verbally with plaintiff to take $18.50 per front foot if paid in cash. We think there can be no doubt that Reveley was fully advised of defendant's pressing need of money. M. P. Reveley and W. F. Brink were real estate agents occupying the same office in St. Louis. Brink wished to purchase this property, having in view its immediate sale to a third party. He believed he could sell to this party for cash. With these objects in view, and influenced by these considerations, the contract was made, and the copy of the deed explanatory thereof was furnished. Brink was the real purchaser, though the contract was made in the name of Reveley. . . .

At the time the contract was made the real estate market in St. Louis was much depressed and so continued until about 1888. From that time on the appreciation in value was very marked, and at the

trial of this case the land in question was worth four times what it was in 1883. Streets had been put through the property. These streets had been paved with asphaltum, sidewalks had been laid and sewers constructed. Defendant testified, and in that he was not contradicted, that he had expended at least $30,000 in improvements. It is true he testified that the street improvements were not commenced until about 1890. It does not appear that plaintiff or his assignor paid taxes either general or special on the land, expended any money in its improvement, or did any act indicating claim or ownership from the date of the contract to the commencement of this suit. Under these circumstances, is plaintiff entitled to the equitable relief demanded?

Courts of equity will refuse to decree specific performance of a contract when to do so would be plainly inequitable and unjust. In the early case of Taylor v. Longworth, 14 Pet. 172, loc. cit. 174, it was said by Mr. Justice Story: "In the first place, there is no doubt that time may be of the essence of a contract for the sale of property. It may be made so by the express stipulations of the parties, or it may arise by implication from the very nature of the property, or the avowed objects of the seller or the purchaser. And even when time is not thus either expressly or impliedly of the essence of the contract, if the party seeking a specific performance has been guilty of gross laches, or has been inexcusably negligent in performing the contract on his part, or if there has, in the intermediate period been a material change of circumstances affecting the rights, interests, or obligations of the parties, in all such cases courts of equity will refuse to decree any specific performance, upon the plain ground that it would be inequitable and unjust." In the case of Holgate v. Eaton, 116 U. S. 40, Mr. Justice Miller declares this language to have become a legal maxim in this class of cases. . . .

We are well satisfied from the terms of the contract, which required performance by the vendee "not later than May 25," and the circumstances under which it was made, that the vendor intended to make the time of performance an essential part of the contract. We are furthermore satisfied that the vendee expected to be prepared to carry out the contract by the time specified and would have been perfectly willing to make time an essence of the contract. He must have known defendant's urgent need for money, from the low price at which he offered the land and the large discount he was willing to

make for cash. A consideration of all these facts and circumstances convinces us that the parties intended to make the time of performance not only a material, but an essential part of the contract.

The delay in applying for relief may not be, of itself, sufficient grounds upon which to deny granting it, but that, coupled with all circumstances, makes a case in which it would be most inequitable and unjust to require defendant to specifically perform the contract. The relief was, therefore, properly denied by the learned circuit judge, and the judgment is affirmed. . . .

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## WELLS v. SMITH.

(New York Court of Chancery, 1837, 7 Paige 22.)

THE CHANCELLOR. This bill is filed to compel. a specific performance of a contract for the sale of a lot of land in New York, the complainant having failed to perform the contract on his part within the time stipulated. And the only questions are, whether upon an executory contract of sale, parties may make time an essential part of the contract, so that this court will not relieve against a noncompliance at the day; and whether it was the intention of the parties in this case to make the payment of the money on or before the time stipulated an essential part of the agreement.

There cannot be a doubt that it was the intention of the parties in this case to make the time specified an essential part of the contract. It is hardly possible to make language more explicit. The contract was, that if the complainant failed or neglected to perform all or any one of the covenants therein contained on his part, at the time or times therein before limited, then and in such case all the covenants and agreements on the part of the defendant should cease and be absolutely void; and all the complainant's right or interest in the premises either in law or equity should cease, etc. And one of the covenants on the part of the complainant was, to build and enclose a house upon the front of the lot on or before the first of August, or in lieu thereof, that he should on that day pay to the defendant one thousand dollars as the first payment towards the purchase money. The complainant had his election to do one or the other, as was most

convenient for him; but if he did neither, it was unquestionably the intention of both parties that the defendant should be no longer bound by the contract. And although Mrs. Smith afterwards consented to modify the contract, so far as to permit him to pay the whole instead of a part only of the purchase money on the day—he not having attempted to build the house—she gave him fair notice that if he suffered the day to pass, without paying the amount stipulated in the contract, she should avail herself of the condition expressed in the agreement and refuse him the deed. . . .

As to the power of the vendor, or of the purchaser, to make the performance of a condition precedent essential to the vesting of a legal or equitable right in the adverse party to a specific performance, I have no doubt; though this court may perhaps relieve against a forfeiture where it would be unconscientious to insist upon a strict and literal compliance. Thus if a vendor, after he has received the greater portion of the purchase money, should attempt to enforce a forfeiture of the money paid, under a stipulation that he might keep the whole amount thus received and the premises also if the last payment was not made at the day, I am not prepared to say that this court would not interfere to compel him either to accept the last payment and convey the premises, or to restore the purchase money already paid; after deducting a reasonable allowance for the use of the premises in the mean time.

In this case, however, the interest of the money till the first of August, and the shop which the complainant agreed to leave on the premises if he did not perform his part of the contract at the day, are not probably more than the value of the use of the premises in the meantime and of the chance of gain to the purchaser by the probable increase in the value of the property. They may, therefore, very properly be considered as reasonable stipulated damages for the non-performance of the contract by the vendee at the time fixed upon by the parties, and are not properly a forfeiture. Although in theory the interest is supposed to be a fair equivalent for the non-payment of money at the time agreed upon, we all know that in point of fact, the person to whom it is due frequently sustains great losses in consequence of the disappointment, which the legal rate of interest cannot compensate. On the other hand, it frequently happens that the perfecting of the title and the delivery of the possession of the premises at the time contemplated by the purchaser is of essential

benefit, to him; which cannot be compensated by damages which are ascertainable by the ordinary rules of computing damages. It would therefore not only be unreasonable, but entirely unjust, for any court to hold that parties, in making executory contracts for the sale or purchase of real estate, should not be permitted to make the time of performance an essential and binding part of the contract in equity as well as at law, where, as in this case, the other party was fully apprised of the intention to insist upon a strict performance at the day. . . .

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## HOYT v. TUXBURY.

(Supreme Court of Illinois, 1873, 70 Ill. 331.)

Scholfield, J. . . . The rule, time and again announced by this court, is, that a party can not call, as a matter of right, upon a court of equity to specifically enforce the performance of a contract; that its exercise rests in the sound discretion of the court, in view of the terms of the contract of the parties, and surrounding circumstances. A party demanding its exercise, is bound to show he himself has always been ready, willing and eager to perform on his part. . . .

In McKay v. Carrington, 1 McLean, 59, this principle is applied to a contract for the sale of real estate, the court saying: "When the property has not materially changed in value, and the circumstances of the parties in relation to it remain substantially as they were when the contract was made, or was made to have been performed, time is seldom considered material. But where a specific execution of the contract will give the purchaser property greatly deteriorated from the value it bore when he should have received it, it would be unjust to compel him to receive it. Chancery will never interpose its powers, under such circumstances, to carry the contract into effect."

And this must obviously apply with equal force in cases, like the present, where the purchaser is seeking specific performance and the property has, pending the delay of the purchaser to determine whether he will take the title the vendor has, greatly increased in value. See, also, Schmidt v. Livingston, 3 Edwards (Chy), 213; Williams' Admrs. v. Stark, 2 B. Monroe, 196.

It appears, from the evidence, that appellant was a real estate broker, and the contract made by him for the purchase of the property, in controversy, was for the purpose of speculation. The location of the property was deemed favorable for that purpose. Its proximity to a contemplated public park, and the prospective improvements incident thereto, afforded reasonable ground for the expectation that it would materially and speedily appreciate in value. This, however, necessarily depended on a number of contingencies, and time alone could fully determine to what extent the expectations would be realized. There was a reasonable prospect of gain for the purchase, at the contract price, but, at the same time, a possibility of loss.

By the terms of the contract, if the title was found to be not good, appellant was to have back the $1000 paid at the execution of the contract. If he failed to comply with the contract, he was to forfeit the $1000 as liquidated damages. Appellant might elect to take the title, notwithstanding his objections to it, but Tuxbury could not compel him to do so. . . .

It is clear, upon the principles before quoted, that appellant was only entitled to a reasonable time in which to determine whether he would take the title Tuxbury had, or reject it, and that he could not keep the trade suspended indefinitely, so as to avail of a rise in the value of the property, or relieve himself from loss by rescinding the contract, in the event of its depreciation and the court below was justified in finding that Tuxbury was authorized to treat the contract as abandoned by appellant.

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## WEBSTER v. FRENCH.

(Supreme Court of Illinois, 1849, 11 Ill. 254.)

This was a bill filed in the Sangamon Circuit Court, to enforce a conveyance of the Quincy House to the complainants. . . .

CATON, J. . . . There is but one other question made in this case, which we think it necessary to examine. It is objected that the complainants have not actually brought their tender into Court with their bill, and deposited it with the clerk. In this Court, this is in

fact a new question, as now presented, although in three different cases, in all of which the opinions were prepared by myself, it has been stated, that the tender should be kept good by bringing the money into Court; yet in none of these was the question distinctly presented, or necessary to a decision, for in none of them had a sufficient tender ever been made, and, consequently, the question did not undergo that careful consideration which would have been given it, had the case turned upon that point. . . .

The result of my examination of this subject clearly shows that the Court of Chancery is not bound down by any fixed rule on this subject, by which it will allow the substantial ends of justice to be perverted or defeated by the omission of an unimportant or useless act, which nothing but the merest technicality could require. The money may, at any time, be ordered to be brought into court, whenever the rights of the opposite party may require it; but while he is insisting that the money is not his, and that he is not bound to accept it, it would seem to be a matter of no great consequence to him whether it is in the custody of the Court or not. The Court possesses a liberal and enlarged discretion on this subject, by the proper exercise of which the rights of all parties may be protected. In all the precedents which I have examined in cases like this, I do not find a single instance in which the complainant, by his bill, professes to bring the consideration money into Court, although a tender is most generally averred. Even where a bill is filed by a mortgagor to redeem, he does not profess in his bill to bring the money into Court, nor is it usual for him to do so, but he only makes a present offer to pay the money. He might, probably, by tendering the amount due, and by bringing it into Court, stop the interest, but if he does not choose to do this, I do not think a precedent can be found for dismissing a bill for that reason. I can perceive no stronger reason for requiring the money to be brought into Court, in the first instance in this case, than in the case of a mortgage. In the case of a bill of interpleader, where the practice on this subject is much more strict than in any other case in chancery, the rule is not inflexible that the fund shall be deposited in Court, and I have been unable to find a single instance, where even such a bill has been dismissed for the sole reason that the fund was not deposited at the time the bill was filed. Indeed, it has been expressly decided that such a bill is not demurrable, because the plaintiff does not offer to bring the

money into court. Meux v. Bell, 6 Sim., 175; 1 Smith's Ch. Pr., 2 Am. Ed. 476; 3 Daniel's Ch. Pr., 1 Am. Ed. 1760.

Without pursuing this subject further, I am satisfied that the expressions used by me in the cases referred to, were not warranted by the law, or at least that they should not be understood as laying down an inflexible rule, prescribing an indispensable condition, which must be complied with before the complainant is properly in Court, or even before the Court will proceed to determine the rights of the parties. It is time enough for the party to bring the purchase money into Court, when he is called upon to do so. . . .

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## DAY v. COHN.

(Supreme Court of California, 1884, 65 Cal. 508, 4 Pac. 511.)

McKee, J. . . . The action was to enforce the specific performance of a parol agreement to convey the legal title to a town lot.

The record of the case shows that the plaintiff proved the agreement as averred in his complaint; that under the agreement he entered into possession of the lot, by and with the consent of his vendor, and expended several hundred dollars in building upon it a dwelling-house and out-houses, which were occupied by himself and his tenants; and that, during his occupancy, he made occasional payments upon the purchase price of the lot, which were accepted by the vendor on account, and the balance he tendered and demanded his deed; and he still was ready and willing to pay what was due, but the defendant, to whom the lot had been conveyed by the vendor, refused to accept the money or to execute a deed.

Possession of a lot of land under a parol contract for the sale thereof, the expenditure of money in the improvement thereof, and partial payments of the price stipulated to be paid for it, constitute part performance of the contract which takes it out of the statute of frauds (§ 1972, Code Civ. Proc.), and entitles the vendee to specific performance of the contract itself, unless there are circumstances in the case which would render it inequitable for a court of equity to grant relief.

There is nothing in the circumstances of the case which shows laches on the part of the plaintiff in the performance of the agreement. No

definite time was named for the payment of the price to be paid. By the terms of the agreement the money was to be paid from time to time "as the plaintiff earned the same." Time, therefore, was not of the essence of the agreement, nor was it made so by notice or demand for the payment of the money at any particular time. The vendor was content to let it remain bearing interest, and he always accepted any payments which were made by the plaintiff in performance of the agreement. The last of such payments was made in 1881, two years before the commencement of the action in hand. There was, therefore, no repudiation or abandonment of the contract by the plaintiff; and as he was all the time, until the conveyance to the defendant, in the actual possession of the lot under the contract, his equitable right to compel performance of it was not barred by the Statute of Limitations. (Love v. Watkins, 40 Cal. 547; Willis v. Wozencraft, 22 Cal. 608; Millard v. Hathaway, 27 Cal. 119.)

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## WEBB v. HUGHES.

(In Equity, 1870, L. R. 10 Eq. 281.)

Sir R. Malins, V. C. . . . This bill was filed for the specific performance of the contract for sale of The Cedars on the 26th of May, 1869. The case set up by the Defendant is that time, if not by the terms of the agreement, at all events by the circumstances of the case, was of the essence of the contract. One stipulation in the agreement was that the Plaintiff should have possession of the property on the 26th of February if his purchase-money was then paid.

The circumstances were these: The Defendant came of age in the year 1868, and required a residence immediately for himself and his mother. It is said that the Plaintiff was aware of that fact, and the Defendant says he informed the Plaintiff that if he could not obtain possession of the property by the time stated in the agreement, it would be of no use to him.

Now, the rules of this Court are plain. A purchaser may, by the terms of the agreement, make time the essence of the contract, but it requires a very strict stipulation to effect that object; or he may make time the essence of the contract, by a notice at any time during the

progress of the negotiations. If, therefore, time was not an essential part of the contract, the Defendant might have made it so by giving the Plaintiff notice to that effect. In my opinion the agreement in this case did not make time the essence of the contract, because the very condition shews that the execution of the contract might from some causes be postponed, and, in that case, interest was to be paid upon the purchase-money until the completion of the purchase; but upon payment of the money, the purchaser was to be entitled to possession of the property. It was, therefore, evidently contemplated that the time might extend beyond the day fixed for completion. But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if title is not shewn. What, then, would have been a reasonable time? What was the Defendant's position on the 7th of April? The solicitors had been negotiating from the 26th of February for completion of the contract, and on the 7th of April the purchaser does not give the vendor even twenty-four hours' notice of his intention, but sends a notice of his immediate abandonment of the contract. If, instead of that, he had given notice that if the vendor did not perfect his title within a reasonable time, then he would abandon his purchase and would require a return of his deposit, that would have been sufficient; but he had no right, under the circumstances, to give notice of immediate abandonment. . . .

In McMurry v. Spicer Law Rep. 5 Eq. 527, I had occasion fully to consider the question, and there I stated (p. 543): "The purchaser is bound to give the vendor a reasonable time for completing his title. No absolute rule can be laid down as to what is a reasonable time. That must depend upon a variety of circumstances. . . . The notice here was a week, which I think was too short a time. He was

bound to give him a reasonable time, and I think that a week, or even a month, was too short; and the notice was ineffectual for the purpose of rescinding the contract, upon the ground of the time not being a reasonable time." On this rule, therefore, it was not competent for the purchaser to give notice of immediate abandonment of his contract. . . .

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## MARSH v. BUCHAN.

(New Jersey Court of Chancery, 1890, 46 N. J. Eq. 595, 22 Atl. 128.)

On appeal from a decree advised by John R. Emery, one of the advisory masters, who filed the following conclusions:

This is a bill by a purchaser against a vendor, for the specific performance of a written agreement to convey lands. . . .

The present case is one where the principal applies for a specific performance of the contract procured, as I have found, by his agent's fraud.

This relief, being purely equitable, will be denied where the situation of the parties requires perfect good faith and openness of dealing in making the contract, and these have not been observed.

In Hesse v. Briant, 6 De G., M. & G. 623, this rule was laid down as applying to a case where a solicitor was acting as agent for both vendor and purchaser, and the court of errors and appeals, in Young v. Hughes, 5 Stew. Eq. 372, 385, approved of the rule of this case. In the present case, it seems to me, that the defendant, before reposing in Sleight the confidence of employing him as her agent, and before making this contract, had not received that fair, open-disclosure of Sleight's relation to the vendors to which she was entitled, and that on this account also, the equitable relief of specific performance should be denied.

I cannot agree with complainant's counsel in his contention, that Sleight's duty to disclose to the defendant his agency for the purchasers, did not arise until after the acceptance of his employment as her agent, and was, therefore, only a breach of his duty to her as her agent, for which she must look to him alone, and for which the complainant should not be punished by refusal to decree the execution

of the contract. Sleight's duty, as I understand it, was to disclose his relations with the purchasers before accepting the agency from defendant. . . . .

*Per Curiam*:—The decree affirmed, for the reason given by the advisory master.

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## BROWN v. SMITH.

(Supreme Court of Iowa, 1902, 89 N. W. 1097.)

PER CURIAM. The plaintiff held a contract for a quarter section of land in Ottertail county, Minn., from the D. S. B. Johnston Land Company, of the value, according to the evidence, of not exceeding $4 per acre, and claims to have entered into an agreement with defendant by the terms of which, in consideration of a deed to defendant of such land, on which was to be executed a mortgage of $500 to said company by defendant, the latter undertook to convey to plaintiff his dwelling house and two lots, of the estimated value of from $1,600 to $2,000, subject to a mortgage to a building and loan association of $750. The defendant admitted as a witness that he made the contract, but insists that he was induced to do so, by the misrepresentations of the plaintiff, and that he promptly repudiated it upon discovery that the land was not as it had been represented. April 2, 1899, Brown wrote of the land: "It is good soil, only about two and a half miles from Elkhart, on the G. N. Ry.;" and again, on April 9th: "I wish you would read an article in today's St. Paul Dispatch about Minn. lands. It is better than anything I can say, and I have been studying it for three years." Defendant testified that plaintiff told him that the land was good tillable land, which cost him $10 per acre, and was located 2½ miles from the above station, and that in making the agreement he relied upon these statements. The plaintiff denies this, and testified that he advised defendant that he knew nothing of the land, and that the latter must learn for himself. But, in view of plaintiff's letters, the court might well have accepted defendant's testimony as the more reliable. True, the defendant, who knew nothing personally of Ottertail county, made inquiry concerning land, but, through probable mistake as to its location, was misinformed as to its

character and value. If he was influenced by the mistaken advice, it does not follow that he did not rely on plaintiff's misrepresentations, so that but for them he would not have entered into the agreement. The land was, in fact, 6 miles instead of 2½ from a railroad station, including a pond or lake of about 25 acres, the north half hilly and sandy, all save the lake, and 15 acres of slough, covered with stumps and brush, and only 80 acres, after being cleared that could be cultivated. Certain it is that with correct information defendant would not have considered a proposition of exchanging property in which his interest was from $850 to $1,250 for a $140 interest in such land. As the plaintiff was undertaking to obtain an unfair advantage over defendant, and this, in so far as successful, was accomplished by deceit, we have no notion of lending our aid to enable him to carry out his enterprise of getting something for practically nothing.

AFFIRMED

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## HETFIELD v. WILLEY.

(Supreme Court of Illinois, 1883, 105 Ill. 286.)

MR. CHIEF JUSTICE SCOTT. . . . The bill is to enforce the specific performance of a written agreement between complainant and defendant, concerning a sale by the former to the latter of his interest in the firm of Frank Field & Co., a firm then and previously engaged in manufacturing crackers and confectioneries. As respects the terms of the agreement there can be no controversy, as it is signed by the respective parties. It obligated defendant to pay complainant $5000 for his interest in the firm of Frank Field & Co.,—$1000 of which sum was to be paid on or before the 1st day of August next after the making of the contract, $2000 in one year and $2000 in two years, the latter payments to be evidenced by two promissory notes, bearing interest at the rate of eight per cent per annum, which said notes were to be secured by a mortgage on lands of defendant described in the bill. On the hearing, the circuit court decreed a specific performance of the contract, and that decree was affirmed by the Appellate Court for the First District. The correctness of the decision of the latter court is called in question on this appeal of defendant.

The defense made is, that the contract is not fair,—that defendant was induced to enter into it under a misapprehension of the real facts, and that complainant contributed to that result by statements not entirely candid or accurate, upon which defendant confidently relied, and was thus overreached in the transaction. . . .

It appears defendant performed the contract in part by making payment of most of the first installment agreed to be paid, and then ceased to do more. Shall he now be compelled to go forward and complete his agreement? To do so would undoubtedly subject defendant to very serious loss. On the principle just stated, equity will hesitate to compel the execution of a contract the performance of which would be oppressive on the obligated party. Considering the whole evidence contained in the record, it is impossible to escape the conviction it would subject defendant to considerable loss to compel him to perform the contract under the circumstances. The assets of the firm were not near so valuable as defendant supposed them to be. The concern owned many more local bills than he had any reason to anticipate. It is said he should have examined the books to have ascertained more accurately the value of the firm assets. There are two answers to this suggestion: First, the books did not show to a casual observer the exact condition of the accounts due the firm, whether good or bad; and, second, the books kept by the regular book-keeper did not show all the local bills owing by the firm. That class of bills only appeared on a private memorandum book kept by one member of the firm, who had charge of that branch of the business. This fact was known to complainant, and was not known to defendant at the time of the sale. When complainant referred defendant to the books for information, he did not advise him where the private memorandum book containing an account of the city bills owing by the firm could be found. Had defendant examined the books as any prudent man would have done, it will be presumed he would have examined only such as were kept by the book-keeper of the firm. It could hardly be expected he would have inquired whether the several partners kept private memoranda of matters pertaining to the firm business. It is proved there were several thousand dollars of city

bills owing by the firm that did not appear on the book-keeper's book. The amount was certainly sufficient to very materially affect the value of the firm assets. Of these city bills defendant did not seem to have had any knowledge when he executed the written agreement it is sought by this bill to enforce by a decree in chancery. Complainant had full knowledge, and he ought to have communicated to defendant that information. He must have known the amount of the city bills very materially affected the value of his interest in the firm he was selling to defendant. In this respect he does not stand so fair that he may invoke the aid of a court of equity.

It will be remembered that the contract was made on the 6th day of July, 1880, and it was some time in October before defendant refused to perform it, and offered to rescind the agreement. That, it is said, was too late; that he should have discovered sooner he had been overreached, and offered to rescind the contract. That may be, and doubtless is, true; but defendant is not asking the aid of the court of equity to enable him to rescind the agreement. Nor is it a material inquiry now whether defendant could rescind the contract after the lapse of so great a period. A more serious question, and one with which the court has now to deal, is, whether complainant has shown a contract so fairly obtained, and so just, that he may invoke the aid of a court of chancery to compel a specific performance. In view of all the circumstances in evidence it can hardly be said that he has. His contract with defendant may be a legal one, and defendant may be required to abide it or answer in damages. That question need not now be determined. Conceding that agreement is obligatory on both parties, under all the circumstances it seems most proper they should be referred to the law courts to adjust the difficulties between them. Whatever claim complainant may have against the defendant, arising out of the agreement, may be compensated by damages recoverable in an action at law. It is no answer to this view of the law to say that complainant may have told defendant, in the office of the lawyer who prepared the papers, he did not know what his interest in the firm was worth, and that he wanted it understood he was selling his interest, whatever it might be, for the sum named in the contract. He may have told him all this, and yet if he obtained an unfair contract from defendant by failing to disclose material facts affecting the value of the interest he was selling, equity will not decree the execution of the

agreement in his favor. It will leave him to his remedy at law, whatever it may be.

The judgment of the Appellate Court will be reversed and the cause remanded.

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## ISAACS v. SKRAINKA.

(Supreme Court of Missouri, 1888, 95 Mo. 517, 8 S. W. 427.)

BLACK, J. This is a suit brought by Isaacs for the specific performance of a written contract, dated February 17, 1882, and signed by the parties therein named. The contract is in the following words: "William Skrainka and Claus Vieths agree to take all the property of J. L. Isaacs now proceeded against on special tax bills in their favor and against said property, before Justice Taaffe and in the circuit court, city of St. Louis, at fourteen hundred dollars, and J. L. Isaacs agrees to convey to them said property by quit-claim deed for said sum." . . .

The substance of the defence is, that there were other outstanding tax bills against the property for other improvements, amounting to about one hundred and fifty dollars; that Isaacs fraudulently concealed the existence of these tax bills, and represented the property to be free from such liens. . . .

The defendants in taking the property at fourteen hundred dollars subject to their tax bills and taxes for 1882 were to pay the full value of the property. They had information that led them to believe that work had been done for which other tax bills could be issued. It is conceded on all hands that the taxes for 1882 were considered, and it it reasonable to believe that other incumbrances were spoken of; and the fact that Isaacs would not make a warranty deed makes it the more probable that inquiry was made in respect of other incumbrances. Three witnesses say that Isaacs said the property was free from such liens. He denies that he made the representation, and two witnesses, who were in a position to hear, say they heard no such representations. It is a familiar rule that where the witnesses are equally credible, the positive evidence that a given thing was said is of more weight than that of others who say they did not hear the alleged statement. Henze v. Railroad, 71 Mo. 639.

Giving to the finding of the court due consideration, still we can come to no other conclusion than this, that Mr. Isaacs did lead the defendants to believe the property was free from other liens, and that this led them to agree to take a quit-claim deed. While the representations may not be such as would support an action at law for fraud and deceit, still it must be remembered that this is an action for specific performance prosecuted by the vendor. Fry says: "In equity, however, it furnishes a good defence to a suit for specific performance that the plaintiff made a representation which was not true, though without knowledge of its untruth, and this even though the mistake be innocent." Fry on Spec. Perf., sec 432. This distinction is pointed out in Dunn v. White, 63 Mo. 182. It is held that it requires much less strength of case on the part of a defendant to resist a bill to perform a contract than it does on the part of the plaintiff, to maintain a bill to enforce specific performance. Veth v. Gierth, 92 Mo. 97. To defeat the specific performance of a contract it is enough that the representation was material, was actually untrue, was relied upon, and did mislead the other party. It need not have been made with an intent to deceive. Pom. Spec. Perf. secs, 217, 218.

We do not think the fact that defendants were to take a quit-claim deed is of any controlling importance. Fry says: "The circumstance that the vendor sold 'with all faults,' though it may serve to put the purchaser on his guard, will not enable the vendor to say that the purchaser did not rely on his representation, or prevent the purchaser from avoiding the sale, if the representation was false." Fry on Spec. Perf., sec. 455. Our conclusion is, that the plaintiff is not entitled to specific performance so long as the property remains incumbered by these tax bills, amounting to a hundred and fifty dollars or thereabouts. As the judgment must be reversed, the cause will be remanded; for while the title may not have been perfect when the suit was commenced, still specific performance may be decreed, if the title be perfected before judgment or decree. Luckett v. Williamson, 37 Mo. 389.

Judgment reversed and cause remanded. All concur.

## DURRETT v. HOOK.

(Supreme Court of Missouri, 1844, 8 Mo. 374.)

Tompkins, J. On the eleventh day of June, in the year 1838, William Hook commenced this suit against Richard Durrett and Edmund McAlexander, in the Circuit Court of Saline county, on the chancery side thereof. In his bill he states, that on the 25th day of October, 1834, Richard Durrett made and executed to Edmund McAlexander his writing obligatory, by which he bound himself to execute and make to said McAlexander a good and lawful deed to a certain tract of land in said county, containing one hundred and twenty acres; and that, for a good and valuable consideration paid by Elijah Hook and William Hook, the complainant, the said McAlexander assigned to them the said writing obligatory; and the said conveyance having to be made by the said Richard Durrett on demand, and Elijah Hook, one of the assignees thereof, having departed this life on the first day of July, 1835, the complainant, William, on the first day of January, 1838, demanded of the said Durrett a deed for the same, according to the terms of the said writing and the said Durrett refused to make the same, &c.

The complainant further alleges, that he is sole devisee and executor of the said Elijah Hook. . . .

The defendant in error contends, that as Benjamin L. Durrett, if he had brought an action against the complainant, Hook, or against McAlexander, on the agreement of pay $280 in time specified, i. e., two or three days, would, under the statute of set-off, be compelled to receive the notes by him made to Hook in pay, therefore, when Hook, by his bill in chancery, prays a specific performance of the contract to convey land, Durrett shall be compelled to take the consideration to be paid for the land in his own notes. I cannot perceive that the one is a consequence of the other. . . .

But if we admit, for the present, that a court of equity could correctly compel a defendant, who had promised to convey for a consideration in money, to receive his own notes in payment for the land, yet the court will always see that the person who prays its aid comes in with clean hands. In this case, Hook first introduces his complaint

with the most impertinent and irrelevant charge that the title to this land was held by Richard Durrett to deceive and defraud the creditors of Benjamin L. Durrett; that he, B. L. Durrett, was largely indebted, and owed Hook a large sum of money. He next introduces this said McAlexander, whom he had released in order to render him competent, to prove his own unworthiness. McAlexander, as above stated, declares that in the treaty for this land he had cautiously concealed from B. L. Durrett that the first payment ($280) was to be made in his own (Durrett's) notes, and that he did not believe that Durrett would have agreed to sell him the land if he had not expected to receive the first payment in cash, and the statement of this witness is sufficient to induce any one to believe that it was intended by Durrett that the delivery of the deed and the payment of the sum of $280 should be simultaneous acts. But as it seems, he takes up the deed and goes off hastily, observing, that in two or three days he would pay the money to B. L. Durrett. He gave no written promise to pay the money. No man of business habits would have suffered the bond to be carried away under such circumstances, nor would any honest candid man have attempted such an act. Mr. Hook not only receives this obligation by assignment stained with the grossly improper conduct of his assignor; but his own witness, this said McAlexander, proves that he prompted the witness to the act. If the conduct of McAlexander had been otherwise honest, a delivery of the bond by Durrett would be presumed, but as the case now is in evidence, a jury would be very easy indeed to find a delivery of the bond. . . .

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## CALDWELL v. DEPEW.

(Supreme Court of Minnesota, 1889, 40 Minn. 528, 42 N. W. 479.)

MITCHELL, J. Action to compel specific performance of a contract of sale of real estate. The terms of the written agreement were that defendant sold and agreed to convey the property "for the sum of seven hundred fifty dollars, upon the following terms: Purchaser to pay the city assessments for grading Minnehaha street, ($205) such payment to constitute part of the above sum of $750, and also to assume the mortgage of $300 and accrued interest, ($12) now on record against said lot, as part of said $750; balance of said $750, after

deducting said assessments and said mortgage, to be paid in cash, on delivery of deed." The defendant in his answer, alleged that the actual agreement was that plaintiff was to pay for the property $750 in cash, and, in addition thereto, assume payment of the mortgage and assessments referred to; that plaintiff undertook to reduce this agreement to writing, and drew up a contract which he presented to de-, fendant, stating and representing to him that it contained the precise terms of this agreement, and then pretended to read it and did read it to him as though it embodied such agreement; that in ignorance of the truth, and misled by the statements of plaintiff, and supposing that plaintiff had correctly reduced the agreement to writing, he executed the contract without reading it. Then follows a somewhat equivocal allegation to the effect that if plaintiff really believed that defendant intended to sell his property for $750, the incumbrances to be deducted therefrom, he was acting under a mistake of fact, but, if he correctly understood the terms and conditions of said agreement, as defendant believes he did, then he committed a gross fraud. The relief prayed for is that the contract be cancelled and adjudged void on the ground of such fraud or mistake. . . .

But we are clear he has made out no clear case for relief. There is no evidence that plaintiff was guilty of any fraud, concealment, or misrepresentations, or took any unfair advantage of defendant. The defendant is a man of mature years, some business experience, and of at least ordinary intelligence and education. The terms of the writing are explicit, unambiguous, and not subject to any doubtful or double construction. In fact they are so very clear and explicit that no man with his senses about him could misapprehend them. The defendant was capable of reading the contract, and had ample opportunity of doing so, and of examining it as fully as he desired, before executing it. It is undisputed that he either read it over himself with the plaintiff or that the plaintiff read it over to him, before he signed it, and, if the latter, there is no evidence that plaintiff did not read it correctly to him. Defendant nowhere testifies that he understood, when he signed it, that it contained any different or other words or language from those that are actually in it. The most that can be claimed for his testimony is that he did not understand the meaning or legal effect of the language as written. No excuse is shown for any such misunderstanding, and the mistake, if any, must have been due solely to defendant's own

gross carelessness and inexcusable inattention. There is nothing unconscionable or hard about the contract, unless it be the inadequacy of the price, and this is not so gross as to be evidence of fraud. Upon the trial plaintiff testified positively that the writing correctly embodied the exact terms of the actual agreement of the parties. The only direct evidence opposed to this was the oath of the defendant. We know of no rule of law that will permit a man to be relieved from his contract under such circumstances. If, on such a state of facts, a person can evade performance by merely saying that he did not know what he was doing, or did not understand the language of the instrument which he executed, written contracts would be of little value.

There are many cases where equity will refuse to enforce the specific performance of an agreement against a party who entered into it under a mistake, although the plaintiff was not guilty of any improper conduct, and the mistake was solely that of defendant. When and under what circumstances such mistakes are relievable it would be impracticable, as well as unsafe, to attempt to enumerate. But one principle will, we think, be found to run through all the cases, viz., it must not be a mistake due solely to the negligence and want of reasonable care on the part of him who asks for relief. Where there has been no fraud or misrepresentation, and the terms of the contract were unambiguous, so that there was no reasonable ground or excuse for a mistake, it is not sufficient, in order to resist specific performance, for a party to say that he did not understand its meaning. Fry, Spec. Perf. § 733; Waterman, Spec. Perf. § 358; Kerr, Fraud & Mistake, 407, 413.

JUDGMENT REVERSED

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## C., B. & Q. R. R. v. RENO.

(Supreme Court of Illinois, 1885, 113 Ill. 39.)

CRAIG, J. In 1858, one Abner Reeves owned lots 26 to 46, inclusive, in block 63, in school section addition to Chicago, bounded on the north by Forquer street, on the east by Beach street, on the south by Taylor street, and on the west by an alley. In the year 1858, the Pittsburg, Fort Wayne and Chicago Railway Company, under the authority of an ordinance of the city of Chicago, constructed its

tracks on Beach street. The tracks so constructed were also used by the Chicago and Alton Railroad Company, and, as appears from the record, were the main tracks running to the passenger depot of the two companies. Soon after these tracks were laid, a switch was built on Beach street, which connected the tracks of the Fort Wayne company with tracks owned by Reeves upon his lots, by means of which, cars passing over the Fort Wayne and Alton roads were switched upon Reeves' premises, which were used by him as a coal and lumber yard. In 1875 Reeves died, leaving Sarah A. Reno and Euginia M. Little, two of his heirs, who purchased the interest of the other heirs in said premises. After they acquired title their husbands, under the firm name of Reno & Little, occupied a portion of the lots as a coal yard. On the 28th day of July, 1880, Mrs. Reno and Little sold the Pittsburg, Fort Wayne and Chicago Railway Company lots 32 to 40, inclusive, in block 63, for the sum of $35,000, being one hundred feet each side of lots 26 to 46. The contract of sale was reduced to writing and contained the following clause: "And it is further so agreed between the parties hereto, that said second party shall, on taking possession of the premises as hereinbefore described, restore all the switch connections now existing between said second party and said first party, or any of them, and continue to them the use of the same, hereafter as heretofore." . . . The Fort Wayne and Alton companies, after taking possession of the premises conveyed to them, restored the switch connections, as provided in the contract of sale; but the Burlington road, upon entering into possession of the premises conveyed to it by Layng, removed the switch connections and tracks which crossed the premises conveyed to it, and constructed upon said premises seven tracks, which it has used and operated ever since. After the Burlington road had removed the tracks which formed the switch connections, the Alton and Fort Wayne roads were requested to restore the switch connections, as provided in the written contract of sale, but the railroad companies declined to comply with this request, and Sarah A. Reno, and her husband, Charles A. Reno, Euginia M. Little and Jacob H. Little, her husband, filed a bill for a specific performance of that part of the contract of sale providing for a switch connection over the premises. . . .

In Chicago and Alton Railroad Co. v. Schoeneman, 90 Ill. 258, which was a bill brought by certain parties to compel the railroad company

to construct and maintain a certain swing drawbridge, in conformity with an agreement in that regard, it was declared to be a settled principle that a specific performance of a contract is not to be decreed as a matter of course because a legal contract is shown to exist, but it rests entirely in the discretion of the court, upon a view of all the circumstances of the case. In the same case it was also held: "Where the effect of the specific performance would be to impose upon the defendants a large expenditure and heavy burden, and inconvenience to public interests, without any practical benefit to the other party, a court of equity, in the exercise of its discretion, will refuse to decree it, and leave such other party to whatever remedy he may have at law for a breach of the contract." . . .

The passenger and freight depots of the Burlington road are located three blocks north of the premises owned by appellees, and the seven tracks constructed by the Burlington road on the premises conveyed by Layng to it, are the only tracks owned by the company where its freight and passenger trains can be made up. The Burlington road has invested in freight and passenger depots about $1,500,000. Thomas L. Potter, general manager, whose evidence is not contradicted, testified that the passenger tracks are used continually all times of the day. Trains are arriving and departing all the time, and every train that comes in has to be made up on those tracks. He also testified that two hundred freight trains a day pass over the tracks, in and out. In answer to a question as to the effect of the construction of switches across the tracks would have upon the business of the road he testified that it would ruin the tracks for business. Indeed, it appears from the evidence that it would be impracticable to operate the proposed switches over the Burlington tracks, on account of the constant use that is made of these tracks by the Burlington road. It seems plain from the evidence, that the construction of the proposed switches across the tracks of the Burlington road would seriously embarrass its operation at that point. The effect could not be otherwise than to delay trains carrying both passengers and freight, and endanger their safety. The carrying of the mails would be retarded, and, indeed, the commercial business of the country would, to a great extent, be disturbed. These are matters in which the public, as well as the Burlington road, have an interest, and we are satisfied, from the evidence, that if the decree should be sustained the public business of the country would be seriously damaged.

Under such circumstances, and where such results are to follow, would it be proper for a court of equity to decree a specific performance of the contract? The decree would impose upon the Burlington road a large expenditure of money and a heavy burden, and would be a detriment to the public interest, and it is condemned under the ruling in the Schoeneman case, supra. The decree would also produce hardship and injustice to one of the parties, and can not be sustained under the ruling in Willard v. Taylor, supra. Nor will the denial of relief in equity operate detrimental to the rights of appellees. If they have been damaged by a breach of the contract they have an ample remedy at law, in an appropriate action. Nor will the denial of the relief prayed for in the bill destroy the business of appelles, or destroy the use of the property as a coal yard. The record shows that the Burlington road has laid tracks immediately adjoining appellees' property, which tracks are used by the company, and connect with its main line, and the main line connects with all the roads leading into the city. Section 5, article 13, of our constitution, requires that "all railroad companies shall permit connections to be made with their tracks, so that any such consignee, and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad." Under this provision, appellees' property, as a coal yard, may, if they so desire, have switch connection with the Burlington road, and being so connected, they will also have connection with all other roads in the city. Indeed, in the answer the Burlington road sets up that its tracks connect with the Fort Wayne and Alton roads, and all other lines in the city, and offers to connect its line of road with the premises of appellees.

After a careful consideration of all the evidence in the record, we are satisfied that the decree of the Superior Court is not right. The judgment of the Appellate Court will therefore be reversed, and the cause remanded. JUDGMENT REVERSED.

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## GODING v. BANGOR & AROOSTOOK R. R.

(Supreme Court of Maine, 1901, 94 Me. 542, 48 Atl. 114.)

WISWELL, C. J. The defendant's railroad extends through the plaintiff's farm. The right of way therefor was obtained by a

deed from the plaintiff to the railroad company, for a consideration named therein of one hundred and fifty dollars. But the plaintiff claims that there was an additional consideration; that the defendant's agent who procured the conveyance of the right of way and who agreed with the plaintiff in relation to the terms for such conveyance, promised in behalf of the company, as a further consideration therefor, that the railroad company should build and maintain a farm crossing on the plaintiff's farm across the railroad track. In this bill in equity, the plaintiff seeks a decree for a specific performance of this alleged contract. The case comes to the law court upon report.

The plaintiff's contention is denied by the defendant and there consequently arises an issue of fact about which there is considerable controversy between the parties. But we do not deem it necessary to determine this question. Assuming, without deciding, that the alleged agreement was made as part of the consideration for the conveyance, we do not think that specific performance should be decreed.

The granting of a decree for specific performance is always discretionary with the court. The contract relied upon in any case may be proved in the most satisfactory manner, and still there may be reasons why the court, in the exercise of its discretion, should not compel specific performance of that contract. We think that such reasons exist in this case, and that before a court should compel a railroad company to build and maintain a grade crossing over its track, except in cases where public convenience may require it, or perhaps where there might be very great individual inconvenience if it were not ordered, the court should be satisfied that the danger to public travel will not thereby be much increased, or that the additional burden placed upon the railroad company would not be greatly disproportionate to the benefit that would be derived by the individual.

Very much is required of railroads to meet the demands of the public for the rapid transportation of passengers and freight, to comply with which the utmost diligence must be exercised and everything that affords unnecessary opportunities for danger must be done away with. A grade crossing over a railroad track is a place of recognized danger, and every additional crossing necessarily increases, to some extent, that danger. The time has not yet arrived when such crossings can be dispensed with altogether, at least in sparsely settled communities, but they should not be unnecessarily increased for the

mere convenience of an individual. At least, we think, the court should not compel the maintenance of such a crossing unless good and sufficient reasons exist therefor.

In this case, in the opinion of the court, the benefit to be derived by the plaintiff, if a decree were granted, would be slight in comparison with the additional burden placed upon the railroad company, and the danger to travel upon the railroad would be considerably increased. It appears that just north of the place of the proposed crossing there is a cut for a distance of eight hundred and seventy feet, through which the railroad track runs on a curve, so that a train coming south would enter this cut near the northerly limit of the plaintiff's land and continue on a curve all the way through this cut until it reached the place of the proposed farm crossing, which, because of the curve and cut, would be shut out from the view of the approaching train. It is argued, and it seems to us with much force, that upon this account the proposed crossing would be much more dangerous than under other conditions. South of the place of the proposed crossing, and only two hundred and thirty feet distant therefrom, there is already a highway crossing over the track, so that if this crossing were ordered, there would be two grade crossings within a distance of two hundred and thirty feet. And by reason of this highway crossing over the railroad track, the plaintiff can, with slight inconvenience use that crossing for his purpose.

For these reasons we do not think that the relief asked for should be granted. We are, perhaps, more ready to come to this conclusion because of the fact that the plaintiff is not without ample remedy. If he is right in his contention, he may recover adequate pecuniary compensation for any and all damages that he has sustained by reason of the failure of the company to perform the contract made by its authorized agent in this respect.

As we have come to this conclusion, for the reason above stated, and not because of a decision adverse to the plaintiff upon the issue of facts, the bill should be dismissed without costs.

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## CHUBB v. PECKHAM.

(New Jersey Court of Chancery, 1860, 13 N. J. Eq. 207.)

THE CHANCELLOR. On the 7th of April, 1855, William Chubb and Lydia, his wife, by deed of that date, conveyed to their

two children, William F. Chubb and Emma Peckham, a small farm, in the county of Somerset, containing about 46 acres of land.

By an agreement of even date with the deed, under the hands and seals of their children, made between the children, of the one part, and their parents, of the other, the children agreed, in consideration of the conveyance, to provide for the support and maintenance of their parents, and each of them, in a comfortable manner, to provide and furnish each of them with proper and suitable clothing, food, medicine and medical attendance, when sick, and to find a comfortable place to live in—all to be according to their age and situation in life—for and during their natural lives and the life of the survivor of them. The children further agreed to accept the title which the father had in the premises; and in case of any adverse claim of title, to be at the expense of defending the title which they thus acquired.

This bill is filed by the father against the children, and charges a failure upon their part to perform the contract, and asks either that the contract be rescinded, and the lands re-conveyed to the complainant, or that a specific performance be decreed.

A decree pro confesso is taken against the son. The daughter alone answers. She admits the contract, alleges that they took the title at her father's request, and solely for the purpose of aiding her aged parents; that she has received nothing whatever from the farm; that its entire proceeds, together with considerable sums advanced by herself, have been appropriated to the support of her parents; that at the time of the contract it was understood and agreed that the father should remain upon the farm, and assist in its cultivation, until a sale could be affected; that the proceeds of the farm, and the limited means of the defendant, are utterly inadequate to support her parents elsewhere than on the farm, and with their assistance. She proffers herself ready and willing to reconvey the land, if the sums she has advanced under the contract are repaid to her.

The evidence in the cause shows that the farm was conveyed to the defendants, not at their request, but at the solicitation of the complainant, and that the title was reluctantly accepted by Mrs. Peckham, the daughter; that she has derived no benefit from it, but that the contract into which she entered upon taking the title has involved her in serious trouble and pecuniary loss. The evidence, moreover, tends to confirm the allegation of the answer, that she accepted the title,

and entered into the contract for her parents' support upon the faith of a parol agreement, cotemporaneous with the written contract, that her father would remain upon the farm, and assist in its cultivation until it could be advantageously sold, and the proceeds applied to his support, and the support of his wife, at such place as they might choose to reside. This evidence, however, is inadmissable to relieve her from the obligation of the written contract. It is in direct conflict with the express terms of her written engagement, by which it is stipulated that the parents, or either of them, should be at liberty to reside in the city of New York, or elsewhere. Evidence of a cotemporaneous parol agreement is inadmissable to alter the terms of the written contract.

However unfortunate or oppressive may be its terms, the parties must abide by their engagement as it is written.

The contract cannot be rescinded, or a re-conveyance directed, even by the consent of the defendants. The wife of the complainant joined in the conveyance, and the contract of the grantees is for her maintenance as well as that of her husband. Her rights are to be protected. She is not a party to the suit. She does not ask, and the evidence warrants the belief that she does not desire a dissolution of the contract. She resides upon the farm with her son, and is supported by her own labor and the assistance of her children. The husband and wife do not live together. The complainant contributes nothing to her support. His interest in the land has been sold, and to order a re-conveyance might strip both parties of their means of support, and must of necessity be prejudicial to the rights and interest of the wife. This consideration is decisive against rescinding the contract for her support, and ordering a re-conveyance of the land.

There must be a decree for a specific performance. Courts of equity may, in the exercise of a sound discretion, refuse to decree the specific performance of a hard bargain.

But this is not a case for the application of the doctrine, nor for the exercise of such discretion. The father conveyed his entire estate to his children, upon their stipulating to provide for their parents a comfortable support and maintenance suited to their condition, wherever they or either of them might choose to reside. It is no answer to a prayer for a specific performance that the property conveyed is of little value and totally inadequate to the support of the

parents in the city of New York, or elsewhere than in the country. That was a proper subject for consideration by the parties when the contract was entered into. But having been made voluntarily and in good faith, the parents are entitled to their support at the hands of the grantees so long as the avails of the property conveyed or the means of the children will suffice for that purpose.

There must be a decree for a specific performance and a reference to a master to ascertain and report what would be a suitable provision, weekly or otherwise, for the comfortable support and maintenance of the complainant, and also of his wife, according to the terms and provisions of the contract.

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## ULLSPERGER v. MEYER.

(Supreme Court of Illinois, 1905, 217 Ill. 262, 75 N. E. 482.)

Ricks, J. . . . It is urged that this contract lacks in the material element of mutuality. The particular ground upon which this contention is based is, that the contract is signed by appellee only. It is found in option contracts, and unilateral contracts generally, that the rule here contended for has no application; that the mere verbal acceptance by the second party to the contract, or the vendee, or the person holding the option, with notice thereof to the vendor and an offer to perform, renders the contract mutual and binding.

But it is said that in the particular contract before us there was no future act or option contemplated, and that the contract had all its validity at the time it was originally made, and that to entitle specific performance of such contract there must be mutuality of obligation and remedy. It is difficult to understand upon what substantial ground the difference in the rule applicable to the two sets of contracts contended for, if its exists, is based. We are unable to understand why the mere written option signed by the vendor shall bind him by the verbal acceptance of the vendee and his offer to perform be held to be a mutual and binding contract within the Statute of Frauds, and the contract of sale acknowledging the receipt of part payment, signed by the vendor, shall be held void for want of mutuality upon the alleged ground that the vendee has not bound himself to perform by some writing. We are aware that there is a diversity of opinion and a

contrariety of holdings by the courts of last resort in the various States upon this subject, but a careful review of the authorities leads us to conclude that a contract otherwise clear and explicit is sufficient to meet the requirements of the Statute of Frauds if signed by the vendor. In the second edition of the American and English Encyclopedia of Law (vol. 29,) the subject under consideration is extensively discussed and the authorities touching it reviewed, and the conclusion there announced is (p. 258): "The weight of authority is, that the statute is satisfied if the memorandum be signed by the parties sought to be charged, alone,—or, in other words, by the party defendant in an action brought to enforce the contract, whether he be vendor or vendee. In the case of a contract for the sale of lands the vendor is usually the person to be charged, and a memorandum signed by him alone is valid. The party not signing the memorandum is not bound unless, as held by some authorities, he has accepted the same as a valid, subsisting contract. Want of mutuality arising from the failure of both parties to sign cannot be successfully pleaded as a defense by the party who did sign, at the act of filing a bill for specific performance binds the plaintiff and renders the contract mutual." . . .

The case of Forthman v. Deters, 206 Ill. 159, is a very late case and on all-fours with the case at bar, and in which the question now before us was fully considered, and the conclusion there reached and announced is, that where a party accepts and adopts a written contract, even though it is not signed by him, he is deemed to have assented to its terms and conditions and is bound by them, and that where the contract purports to be a consummated contract, the mere acceptance and adoption of the writing establishes mutuality and makes the contract binding on both parties. We deem that case conclusive of the case at bar.

We regard the rule as too well established to be open, that appellee, who is the vendor having signed the writing herein above set forth, cannot defeat performance upon the ground of want of mutuality, based upon the fact, alone, that appellant, the vendee, did not sign the same. The appellant had paid part of the consideration and had offered to pay the whole of it within a few days of the making of the contract, and unless appellee, by her answer, shall show that to enforce the same would be inequitable for some reason other than the mere want of the signature of appellant to the contract, we are of the opinion that she should be required to perform. . . .

## THURBER v. MEVES.

(Supreme Court of California, 1897, 119 Cal., 35, 50 Pac. 1063.)

VAN FLEET, J. January 1, 1883, plaintiff made a contract in writing with Otto Meves, under which Meves entered into the immediate possession of a tract of about forty acres of land belonging to plaintiff, the whole of which available for the purpose Meves was to clear up and cultivate to such fruit trees, grape vines and small fruit plants as should be furnished for the purpose by plaintiff—a certain acreage to be cleared and set out each year during the period of four years; and under which contract Meves was to erect certain fences and open up a certain private way or road, in consideration of which services plaintiff was to convey to Meves on January 1, 1888, the title to the north half of said premises.

On March 10, 1884, Meves borrowed of plaintiff one hundred and fifty dollars, for which he gave his promissory note payable two years from date, with interest at one per cent per month, payable quarterly, and to secure payment of which he gave plaintiff a writing which referred to the first mentioned contract, and provided that said contract should be held as security for payment of the note, and making the right to the conveyance therein provided for, "dependent upon the payment thereof at the time and in the manner mentioned in said promissory note, in addition to the other conditions precedent to said conveyance."

August 14, 1889, Meves died, and March 10, 1890, plaintiff brought this action against defendants, the heirs of Meves, to quiet title to the north half of the land described in said first mentioned contract, then held and occupied by defendants, and to acquire possession thereof.

In a cross-complaint the defendants set up the contracts between their ancestor and plaintiff above referred to, alleged a compliance with the terms of the first, except to a partial extent wherein compliance was prevented by certain acts of plaintiff, a tender of payment of said note and willingness and readiness to pay any amount found due thereon, and prayed that plaintiff be decreed to convey to them the portion of land stipulated in said contract. The court below found the facts in all material respects as alleged in the cross-complaint, except as to the alleged tender of payment of the note, and made a

decree wherein plaintiff is required to convey the land to defendants upon payment by the latter, within sixty days, of the amount of said note and accrued interest.

Plaintiff appeals from the judgment and from an order denying him a new trial.

1. It is first contended that inasmuch as the principal contract counted on by defendants was entered into by plaintiff solely in consideration of the personal services of Meves to be thereafter rendered, which services could not have been compelled by plaintiff, there was presented at the time the contract was entered into such a lack of mutuality as to take the contract out of the class which is susceptible of specific performance by either party. While it is a general and well-established rule that mutuality of remedy is essential to authorize the specific performance of a contract, this rule does not require that such mutuality shall exist in all cases at the inception of the transaction. Thus in the case of Hall v. Center, 40 Cal. 63, 67, speaking of this requirement, it is said by our predecessors: "The rule is one which is frequently adverted to, is well understood, and the reasons upon which it is rested are familiar. But the exceptions to its operation are numerous. Lord Redesdale, in Lawrenson v. Butler, 1 Shoales & L. 13, limits its application to a case 'where nothing has been done in pursuance of the agreement,' by which it is to be understood that though an agreement may, at the time it was entered into, lack the element of mutuality, and for that reason may not be then such an agreement as equity would enforce, yet if the party seeking relief has subsequently, with the knowledge and the express or tacit consent of the other, placed himself in such a position that it would be a fraud for that other to refuse to perform, equity will relieve."

The principles there announced are sustained in the later cases of Ballard v. Carr, 48 Cal. 74, and Howard v. Throckmorton, 48 Cal. 489. And, adverting to this element of mutuality and the question as to the time when it must exist, it is said by Mr. Waterman: "The rule as to the time is to be taken with this qualification, that notwithstanding the contract when it is entered into be incapable of specific performance by one of the parties, or, being enforced against him, yet if the obligation to perform be mutual and the obstacle to performance be subsequently overcome, a decree may then be rendered. If the

plaintiff has performed his part of the agreement, specific performance may be decreed, although the contract, so far as concerned performance by the plaintiff, was originally beyond the jurisdiction of the court;" Waterman on Specific Performance, sec. 199. The authorities cited by appellant are not at variance with this qualification of the rule.

And while an obligation to perform personal services is one of which specific enforcement may not be had (Civ. Code, sec 3390), this rule has not the effect to defeat the right to have the specific benefit of an enforceable obligation entered into in consideration of personal services, where such services have been fully or substantially performed. (Ballard v. Carr, supra; Howard v. Throckmorton, supra; King v. Gildersleeve, 79 Cal. 504, 510.) In Howard v. Throckmorton, supra, which like Ballard v. Carr, supra, was an action to enforce an obligation to convey land in consideration of personal services as an attorney, it is said: "While it is true as a general proposition that a party who has contracted to perform services of the character mentioned in the contract in this case cannot maintain an action for specific performance while the contract remains unperformed on his part, he is as fully entitled to maintain such action as he would be if the agreement on his part had been for the payment of money." . . .

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## WATTS v. KELLAR.

(United States Circuit Court of Appeals, 1893, 56 Fed. 1.)

Caldwell, D. J. . . . By the terms of this contract the defendants, in consideration that the plaintiff would pay $7,000 for the lot, agreed to pay the plaintiff $7,700, therefor at the expiration of one year from the date of plaintiff's purchase, if the plaintiff should then elect to sell the lot at that price. The consideration for this agreement is expressed in the contract, and is sufficient. An option to sell land is as valid as an option to buy. When one holding a buyer's option makes his election to purchase, and tenders the money according to the terms of the contract, it is the duty of the seller to accept the price, and execute a deed to the purchaser for the property; and when one holding an option to sell elects to make the sale, and tenders a deed, it is the duty of the buyer to accept the deed, and pay the price. Such

contracts are perfectly valid, and it is now well settled that a court of equity may decree a specific performance of them. A suit for that purpose is, of course, subject to the general rule that the specific performance of contracts for the purchase or sale of land is not a matter of course, but rests in the discretion of the court, in view of all the circumstances. But the rules by which the court will be guided, in a suit like this, in decreeing or refusing a specific enforcement are the same that they are in other suits for the specific enforcement of contracts relating to land. Cases may be found which hold that such contracts will not be specifically enforced, because the right to a specific enforcement is not mutual. The want of mutuality of right to a specific performance of a contract, which sometiemes precludes its enforcement in equity, has no application to an option contract of the character we are considering. The purchaser of an option to buy or sell land pays for the privilege of his election. It is that very privilege which the other party to the contract sells. In the absence of an agreement to the contrary, each party to a contract to buy or sell land may have its specifically enforced against the other (Raymond v. Land & Water Co., 4 C. C. A. 89, 10 U. S. App. 601, 53 Fed. Rep. 883) ; but the very purpose of an optional contract of this nature is to extinguish this mutuality of right, and vest in one of the parties the privilege of determining whether the contract shall be vitalized and enforced. An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them specifically enforced that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but, if he cannot do this, and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a lawsuit for an uncertain measure of damage as of any value. The modern, and we think the sound, doctrine is that when such contracts are free from fraud, and are made upon a sufficient consideration, they impose upon the maker an obligation to perform them specifically, which equity will enforce. Pom. Cont. § 167-169, and notes; Willard v. Tayloe, 8 Wall. 557; Brown v. Slee, 103 U. S. 828. In the case last cited, the supreme court of the United States enforced, quite as a matter of course, the specific performance of a seller's option which was in these terms:

"It is further understood and agreed that, if said executors desire it, said Brown shall, at the expiration of five years stated in said contract of April 25, 1871, repurchase the 130 acres of land in the city of Des Moines at $25,000. . . ."

The opinion of the court was delivered by Chief Justice Waite, and discussed at length the sufficiency of the executors' notice of their election to sell, and the question whether the tender of the deed was timely; but contains no intimation that the want of mutuality in the contract was any impediment to its specific enforcement. The want of mutuality was too obvious to be overlooked, and the fact that it was not adverted to shows that, in the judgment of that court, the right to enforce the specific performance of such a contract was too well settled to require or justify any observation. Viewed in any light, the bill presented a case of equitable cognizance, and it was error to dismiss it. . . .

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## DRESSEL v. JORDAN.

(Supreme Court of Massachusetts, 1870, 104 Mass. 407.)

WELLS, J. . . . This consideration leads to another objection urged by the defendant, namely, that there is a want of such mutuality as is requisite for an agreement entitled to specific enforcement. So far as this objection rests upon the ground that there was no legal and sufficient agreement on the part of the sellers, for any of the reasons already considered, no further discussion is necessary. Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfill the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able, in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance. . . .

The equitable rule is established by numerous authorities, that where time is not of the essence of the contract, and is not made material by the offer to fulfill by the other party, and request for a conveyance, the seller will be allowed reasonable time and opportunity to perfect his title, however defective it may have been at the time of the agreement. And in all cases it is sufficient for the seller, upon a contract made in good faith, if he is able to make the stipulated title at the time when, by the terms of his agreement or by the equities of the particular case, he is required to make the conveyance, in order to entitle himself to the consideration. . . .

In the present case, although a fixed time was named in the contract for conveyance of the title, the defendant was himself at no time ready to receive it until after the plaintiffs had, by the sale to Cram, enabled themselves, by means of a quitclaim deed from Cram, to transfer the whole title. The plaintiffs were not therefore at any time in default, in respect to the title to this third part of the estate. . . .

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## LOGAN AND WIFE v. BULL.

(Kentucky Court of Appeals, 1880, 78 Ky. 607.)

Pryor, J. This action was instituted in the Louisville chancery court on the 1st of December, 1873, by the appellants, Logan and wife, against John Bull, for the specific execution of a contract evidencing the sale of a lot of ground and the improvements on the northeast corner of Fifth and Market streets, in the city of Louisville. . . .

It is further contended by the appellees that a specific execution of the contract should be denied because the title to a part of the lot is in the *feme covert*, and as the chancellor has no power to compel *her to convey*, there is such a want of mutuality in the obligation as to render the contract invalid.

The general doctrine is, that a contract incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. (Fry on Specific Performance, page 198.)

It has often been held under this rule, that a party at the time he makes his contract, although not invested with such a title as he

undertakes to convey, may compel a specific execution where time is not of the essence of the contract. Cases may be found, and language used by some of the elementary writers on the subject, conducing to the conclusion that, in the absence of such a title in the party at the time of making the contract as he contracts to convey, the vendee may rescind, and a specific execution will be denied; but the equitable rule as now settled by nearly all the authorities on the subject is, that when the contract is required to be performed, if the party is able to convey, and tenders his deed, the contract will be enforced, although his title was defective at the date of the contract; and if not able to convey at the time of filing a bill of rescission, if time is not of the essence of the contract, the chancellor will permit the vendor, if he can do so within a reasonable time, to supply the defects in his title, so as to comply with his contract. (Dressel v. Jordan, 104 Massachusetts.)

In this case the husband and wife, living at the time in the state of Missouri, authorized their agents in Louisville, by telegraph and by letter, to make the sale to the ancestor of the appellees on the terms mentioned in the writing. The obligation to perform the contract was as binding on Logan as on Bull, and the fact that the title to a part of the lot was in the wife, who could not be compelled to convey, is immaterial. If in a reasonable time Logan was ready to make good the title, and particularly when he has not failed to make a title on the demand of the vendee, the purchaser should be compelled to accept it. The ancestor of the appellees knew when he made this purchase that the title to a part of the lot was in the wife, and that the chancellor could not coerce a conveyance, and whether he possessed this knowledge or not, the obligation on the husband to convey was as binding on him as the obligation on the vendee to pay the money.

The ancient practice in equity was to decree the husband to perform his contract in such a case where, as Lord Eldon says, it was usually impossible for him to perform. The modern rule on the subject is to adjudge a specific performance, although the title may have been in the wife when the contract was made with the husband, if the latter is ready to comply by tendering such a conveyance as will pass the title. If the wife consents to convey, and does convey, the vendee has no right to complain. . . .

# CHAPTER III. SPECIFIC REPARATION AND PREVENTION OF TORTS.

## SECTION I. WASTE.

### OHIO OIL CO. v. DAUGHETEE.

(Supreme Court of Illinois, 1909, 240 Ill. 361, 88 N. E. 818.)

DUNN, J. The appellee N. P. Daughetee is the owner in fee of 190 acres of land in Clark county. His sister, Sydney A. Stephenson, died in 1895, owning 60 acres adjoining it on the south, which by her will she devised as follows:

"I give and devise and bequeath to Nathaniel P. Daughetee, trustee, in trust, and to his successors forever, all my estate, real, personal and mixed, of whatever kind or nature soever, of which I may die seized or possessed, to have and to hold, manage, rent, lease and control, in trust, for the uses and purposes following: To pay the expenses of such trust and for necessary repairs and taxes, and to pay over the annual proceeds therefrom to my nephew, Rhinehart C. Daughetee, for and during the natural life of him, the said Rhinehart C. Daughetee, with remainder over to the heirs of the body of said Rhinehart C. Daughetee upon his death, provided he die leaving a child or children or descendants of child or children, equally, share and share alike, to them and their heirs forever. In the event of the death of said Rhinehart C. Daughetee without issue of his body then surviving, then and in that event I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, to my brother, Nathaniel P. Daughetee, and his heirs forever."

On June 3, 1904, N. P. Daughetee entered into a written contract with a co-partnership doing business under the name of Hoblitzell

& Co., whereby he granted to them all the oil and gas in and under both his own 190 acres and the 60 acres held by him in trust, together with the right to enter thereon at all times for the purpose of drilling and operating for gas and oil, and to erect and maintain all buildings and structures and lay all pipes necessary for the production and transportation of oil and gas, with a right of way over and across said premises to the place of operation, and the exclusive right to remove any machinery or fixtures placed on said premises, doing the least possible damage to said premises, and with the right reserved to the grantor to use the premises for tillage and for all other purposes not inconsistent with the object of the lease. The contract was for the term of five years and as much longer as gas or oil was found in paying quantities. . . .

N. P. Daughetee had possession and control of the 60 acres under his sister's will as trustee. He had no present beneficial interest in the land. His only authority to contract in regard to its possession or use was derived from the will, which gave him the right to manage, rent, lease and control the land, but no authority to sell or mortgage it or any part of it. The power of control and management given him was, during Rhinehart C. Daughetee's lifetime, for the purpose of making necessary repairs, paying taxes and expenses and paying the net annual proceeds to him. The only management and control contemplated was that which had to do with the annual proceeds of the land. The authority of the trustee was to grant ordinary farming leases in accordance with the ordinary terms of the neighborhood, but not unusual leases or leases of unopened mines. 2 Perry on Trusts, sec. 528; Clegg v. Royland, L. R. 2 Eq. 160.

Granting that the trustee held the title in fee, he held it for the benefit of the remainder-man as well as the life tenant, and had no right to waste the estate for the benefit of the life tenant at the expense of the remainder-man. It is a well established rule of law that the opening of new mines upon land by a life tenant amounts to waste. (Priddy v. Griffith, 150 Ill. 560.) The same rule applies to oil wells. Oil is a mineral and part of the realty. Owing to its fugitive nature, a grant of oil under the ground is a grant, not of the oil in place in the earth, but of such oil as the grantee may find there and save. The right to go upon the land and remove all the oil, if of unlimited duration, is a freehold estate, (Watford Oil and

Gas Co. v. Shipman, 233 Ill. 9; Bruner v. Hicks, 230 id. 536;) and a grant of such right is, therefore, in legal effect, a sale of a portion of the land. Blakely v. Marshall, 174 Pa. 425; Stoughton's Appeal, 88 Pa. 198.

There were no oil wells on the land at the time of the testatrix's death. A tenant for life, under such circumstances, would have had no right to operate for oil on the land. (Marshall v. Mellow, 179 Pa. 371.) Neither could the trustee operate for his benefit. The taking out of the oil would be waste, which a court of equity will enjoin. Williamson v. Jones, 43 W. Va. 562.

Counsel for appellant insist that the remainder to Homer Daughetee is contingent; that he has no estate in the land but a mere expectancy, which will not enable him to maintain the suit. On the other hand, it is contended in behalf of appellees that the remainder is vested and the court so found. It is not essential to a decision of the case to determine whether the interest of Homer Daughetee is vested or contingent. A contingent remainder-man has no certain estate in the land, and therefore no standing to maintain an action at law for past waste or a bill for an account therefor; but, though his claim depends upon a contingent event, he may maintain a bill against a life tenant to enjoin future waste, because otherwise no remedy exists for the protection of the interest in remainder but the life tenant without a semblance of right may despoil the inheritance with impunity. The bill, in such case, may be maintained for the protection of the inheritance, which is certain though the person on whom it may fall is uncertain. (Brashear v. Macey, 3 J. J. Marsh. 93; Cannon v. Berry, 59 Miss. 289; Coward v. Myers, 99 N. C. 198; Lewisburg University v. Tucker, 31 W. Va. 621.) The acts which the crossbill seeks to enjoin and which the appellant claims the right to commit, clearly amount to waste against the remainder-man. The trustee could not authorize them. The case is different from those of Fifer v. Allen, 228 Ill. 507, and Gannon v. Peterson, 193 id. 372. The defendants sought to be enjoined in those cases were owners of the fee, determinable, it is true, but still having all the rights of tenats in fee simple until the determination of their estates. The acts sought to be enjoined were such as they might rightfully do as owners of the fee. The interests sought to be protected were mere expectancies, which might never have any existence. Here the interest

sought to be protected is certain to accrue and the acts sought to be enjoined are without color of right of any kind. This case is within the requirements suggested in the cases just mentioned, the contingency being certain to happen and the waste threatened amounting to a wanton and unconscientious abuse of right. . . .

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## TAYLOR v. ADAMS.

(Missouri Court of Appeals, 1902, 93 Mo. App. 277.)

Ellison, J. This action is for waste alleged to have been committed by defendant on the lands described in plaintiffs' petition. At the close of plaintiff's case the trial court sustained a demurrer to the evidence. The question involved arises out of the following deed: . . .

This deed conveyed an estate for life to Elenora Taylor, for though she had also the power of appointment over the remainder, that did not enlarge the estate especially limited. Evans v. Folks, 135 Mo. 397. Elenora is alive, and at the time of the trial was fifty years old. Her life estate was sold at sheriff's sale and defendant became the purchaser. He thereby became tenant for the life of Elenora, and as such he is charged by plaintiffs, who are Elenora's children, with waste of the estate, and damages are asked. The plaintiffs base their claim of right to sue on the idea that they are owners of the estate in remainder. Their right to sue depends on whether their estate in remainder is vested or contingent. If contingent, they have no standing in law for in such event it can not be known in advace of the happening of the contingency, that they have been damaged by the waste. If they should recover damages, and then the contingency upon which their estate depends not happen, they would be paid for what they had not lost. And so the law is that a contingent remainderman has no action for waste (Sager v. Galloway, 113 Pa. St. 500; Hunt v. Hall, 37 Maine 363), though in equity they could perhaps have injunction to prevent future waste (Cannon v. Barry, 59 Miss. 289, 302; University v. Tucker, 31 West Va. 621.) The distinction of the contingent remainderman's right at law in damages and in equity to an injunction has good reason in its support. For while

he will not be allowed to recover damages for that which may not be his, he should be allowed to prevent the destruction of that which may become his.

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## MORRIS v. MORRIS.

(In Chancery, 1853, 3 De G. & J. 323.)

This was an appeal by the plaintiffs from an order of Vice-Chancellor Stuart dismissing the bill which was filed to obtain, among other things, compensation out of the estate of a deceased tenant for life for equitable waste in pulling down a mansion-house called Clasemont, in Glamorganshire.

In June 1819, Sir John Morris, the father, settled the barony of Sketty, in Glamorganshire, and other estates, on himself for life, with remainder to the use of trustees for 1,000 years, upon trusts for raising money to pay off certain charges, and subject thereto to the use of trustees during the life of Sir John Morris the son, without impeachment of waste (provided the same should be committed or suffered with the privity or assent of Sir J. Morris, the son), upon trust to preserve contingent remainders, and to permit Sir J. Morris, the son, to receive the rents during his life, with remainder to the use of Sir J. Armine Morris, for life, without impeachment of waste, with remainder to the use of the first and other sons of Sir J. A. Morris, successively in tail male, with ultimate reversion to the settlor in fee.

The settlor died soon after the date of the settlement, and Sir J. Morris, the son, entered into possession. At this time there was upon the settled estates the mansion-house of Clasemont. This house had, for various reasons, become undesirable as a residence, and the settlor had, for some years before his death, shut it up, and had made some preparations for building another at Sketty, upon part of the settled estates. In 1820, at which time Sir J. A. Morris, the grandson of the settlor, was about nine years old, Sir J. Morris, the son, pulled down the mansion at Clasemont, and soon afterwards completed the new one at Sketty, which was much superior to the old one. It was proved in the cause, as satisfactorily as such a fact

could be expected to be proved at such a distance of time, that the bulk of the materials of the old house had been employed in erecting the new one, and there was no evidence to show that any part of them had been sold.

In 1847, Sir J. A. Morris obtained an injunction to restrain Sir J. Morris, the son, from cutting down ornamental timber in the grounds at Clasemont, and the order granting this injunction was affirmed by Lord Cottenham.

Sir J. Morris, the son, died in 1855, leaving a will, by which he appointed his widow, Lady Morris, his executrix.

The present bill was filed by Sir J. A. Morris and his eldest son against Lady Morris, asking, among other things, that it might be declared that the pulling down the mansion-house at Clasemont was an act of equitable waste, and that an account might be taken of the application of the materials, and of the profits received by Sir John Morris, the son, from them, and that the amount of compensation to which the plaintiffs might be entitled in respect of such waste might be paid into Court.

Vice Chancellor Stuart dismissed the bill without costs, and the plaintiffs appealed. The bill also raised another question, but as the defendant, upon the hearing of the appeal, did not resist a decree upon that part of the case, and no argument took place upon the point, it is not thought necessary to notice it further. . . .

The Lord Justice Knight Bruce. This is not a question of in junction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable debt, in considering which we must look to the particular circumstances of the case. That it was a reasonable, a judicious, and a beneficial thing to pull down the house at Clasemont, and to use the materials, so far as they could be used, for building the mansion at Sketty, is perfectly clear; but I agree with Mr. Malins, that an act may be reasonable, may be judicious, may be beneficial to all the persons interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness, and on the beneficial nature of what was done, but they are ingredients in it. The estate has been benefited by what has been done, and the plaintiffs are receiving that benefit. Still, if it had been shown, or were in any degree likely, that any part of the materials

of the house had been sold, probably, notwithstanding the much larger expenditure on the construction of the new mansion-house, the assets of the second baronet would have been held liable to account. Here however, there is no evidence that any part of the materials was sold, and the probability is, that no part or no substantial part of them was sold. There is evidence that most of the materials, probably all the materials that were of any value, were applied in building the present mansion-house in a proper position upon the estate. In my judgment it would be unjust, and would be stretching a rule beyond its reason, to make the tenant for life account for the materials of a mansion-house on the estate, wisely pulled down, when the materials have been so applied in rebuilding. I am of opinion, therefore, that in the circumstances of the present case, there is no ground for directing an account of equitable waste, and the bill ought to remain dismissed, as far as it relates to the materials of the Clasemont house. . . .

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## KING v. SMITH.

(In Chancery, 1843, 2 Hare 239.)

VICE-CHANCELLOR. The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient, the court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1,000, and the property to be worth £1,000 that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one-third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would probably require more. It is rather a question of prudence than of actual value. I think the question which must be tried is whether the property the mortgagee takes as a security, is sufficient in this sense,—that the security is worth so

much more than the money advanced,—that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect to the timber, and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shown, I am not told the quantity of the land, or the rental; nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the Defendant's affidavits, that he did not cut any of the trees with intention of injuring the estate but on the contrary, he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious, that the Defendant is using language, of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

Let the motion stand over, with liberty to apply. If the Defendant proceeds to cut more timber, the Plaintiff can renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.

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## MURRAY v. HAVERTY.

(Supreme Court of Illinois, 1873, 70 Ill. 318.)

Scott, J. It is not controverted defendants dug and removed large quantities of coal from the premises described in the declaration,

and hence the principal question is, whether they can justify under the license offered in evidence.

The land upon which the alleged trespasses were committed was owned, at the time, by tenants in common. It was subsequently divided, and the east half set off to plaintiffs, for whose use this suit was brought. Prior to the entry of defendants upon the premises, they had entered into an agreement with Peter Howard, who was a tenant in common with plaintiffs' by which they obtained the privilege to enter and construct a drain across the premises, but below the vein of coal. It was to be for their own benefit, and for the privilege secured they were to pay $200.

The construction of the drain would necessarily require the excavation and removal of large quantities of coal, for which they agreed to pay at the rate of two cents per bushel.

It is insisted, this license is a bar to an action of trespass for anything done by defendants in the execution of the contract. . . .

Counsel, however, maintain that defendants can defend against the alleged trespasses, under a license obtained from one of the tenants in common. Waiving any technical objection that might be urged against the form of the plea, under this view of the law, we do not think the proposition assumed can be sustained, either upon reason or authority.

The common law doctrine is, tenants in common are seized of each and every part of the estate, but it is not in the power of one to convey the whole of the estate, or the whole of a distinct portion, or give a valid release for injuries done thereto. It has most generally been ruled that, as against the other co-tenants, such a deed is inoperative and void. Marshall v. Trumbull, 28 Conn. 183; Hutchinson v. Chorr, 39 Maine, 513; 4 Kent's Com. 368.

No principle is better settled, than that one tenant in common can not lawfully commit waste or destroy the common property, or do any act that will work a permanent injury to the inheritance. Our statute has authorized one tenant to maintain trespass or trover against his co-tenant, who shall take away, destroy, lessen in value or otherwise injure the common property. Mining coal or excavating and removing earth, would tend to injure, destroy and lessen in value the estate. Notwithstanding the fact, in contemplation of law, tenants in common are all seized of each and every part of the estate, still, neither

one is permitted with impunity to do acts deemed prejudical or destructive of the interests of the other co-tenants. If a tenant in common can not himself lawfully dig and remove the soil or coal or other valuable material beneath the surface, that would tend permanently to lessen the value of the estate, how can he grant that right to a stranger? Upon principle, the licensee can take no better title or higher authority than the licensor himself possessed. The law would not permit Peter Howard to enter upon the common property and remove from thence the coal deposits, which must constitute the real value of the estate. Hence it follows, his warrant or license to a stranger would afford no answer to an action of trespass brought by his co-tenant. . . .

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## LIPPINCOTT v. BARTON.

(New Jersey Court of Chancery, 1886, 42 N. J. Eq. 272, 10 Atl. 884.)

Bird, V. C. This bill is filed by the executor of Ann H. Pancoast, deceased, to recover the value of trees cut by her husband David C. Pancoast, who continued in possession as tenant by the curtesy of her lands after her death. The defendant against whom the suit is instituted, are the executors of the tenant for life. It is claimed that this suit may be maintained in this court for the waste commited, on the ground of equitable conversion, and upon the ground of injustice to Clement G. Lippincott, one of the grandsons of David C. Pancoast, by whose will he has but $100 bequeathed him, while by the will of Ann H. Pancoast he has an equal interest with the other legatees.

Neither of these alleged grounds brings the case within the jurisdiction of this court. I have examined a number of authorities, and none of them goes so far as to sustain the complainant's insistment.

In Ware v. Ware, 2 Hal. Ch. 117, the doctrine, which is expressed in all the other authorities, is that an account for waste done is only incidental to relief by injunction against further waste. 1 Lead. Cas. in Eq. 1024; Jesus College v. Bloome, 3 Atk. 262; Winship v. Pitts, 3 Paige 259; Story's Eq. §§ 616, 518.

From these and other cases it appears that this court only has jurisdiction to compel an account as incidental to the right of an injunction

to stay the commission of further waste, and that only in order to prevent a multiplicity of suits. Grierson v. Eyre, 9 Ves. 341, 346; Watson v. Hunter, 5 Johns. Ch. 169; 1 Addison on Torts 319.

Nor can I conceive of any principle upon which this complainant can stand in this court for the recovery of these moneys. If he is entitled to them he can recover them by an action at law for money had and received, or for the trespass in cutting, or trover in converting. Rev. p. 396, § 5.

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## LANSDOWNE v. LANSDOWNE.

(In Chancery, 1815, 1 Maddock, 116.)

THE VICE-CHANCELLOR (SIR THOMAS PLUMER). Upon this demurrer two points are to be considered: 1st. How the case stood as to the deceased marquis? 2ndly. How the case stands as to his representatives? The late marquis was tenant for life, without impeachment of waste and as such had a right at law to cut timber on the estate, and had a property in the trees, but having abused that power by cutting ornamental trees, and trees not ripe for cutting a Court of Equity says he shall not do these things with impunity, but interposes to restrain the legal right; and equity not only restrains him from doing further waste, but directs an account of the waste done, and will not suffer the individual to pocket the produce of the wrong, but directs the money produced by such waste to be laid up for the benefit of those who succeed to the estate. . . .

What is said in Jesus Coll. and Bloom, as to not entertaining a bill after the estate of the tenant for life is determined, applies only to cases where legal waste has been committed and where the party is liable at law in respect of the waste committed; but here it was equitable waste, as to which a Court of law gives no remedy. Lord Hardwicke, in that case, says, "The party ought to be sent to law;" which shews he was alluding to legal waste. The party had for such waste a remedy under the statute of Marlbridge, (52 Henry 3, c. 23), or might have brought an action of trover, but the Court never sends a party to law in cases of equitable waste, they being exclusively of equitable cognizance. As against the late marquis, therefore, a bill might have been

filed though no injunction were prayed. This Court will not permit a man to commit equitable waste, and retain the produce of the injury, which is recoverable in no other Court. Relief is given for the benefit of those who come after. The case, therefore, of Jesus College and Bloom is distinguishable from the present. In Garth and Cotton, Lord Hardwicke, alluding to his decision in that case, says: "It affords no conclusive argument that a bill for an account of waste cannot be maintained without praying an injunction." (1 Dick. 211). The marquis died, after having sold and converted to his use the money produced by his wrongful act; and upon general principles, independent of decision, the assets ought to be liable to pay in respect of his conduct, such assets having been augmented by it. . . .

It has been argued that, as when legal waste is committed, and there are no persons in being, or appearing, who could authorize it, or bring an action in respect of the waste, the wrong is without remedy; so here, there being no person *in esse*, or appearing, when the waste was committed, who could authorize it, a bill will not lie in respect of such waste; but it signifies not whether such person were *in esse* or not, for waste of this description could not be authorized—such destruction cannot be authorized—the Court says it shall not be done. The produce of the waste is laid up for the benefit of the contingent remainder men. (Williams v. Duke of Bolton, mentioned in Mr. Cox's note to Bewick v. Whitfield, 3 P. Wms. 268.) To adopt such an analogy to the law, in a case where relief is given against the law, would be singular.

Upon these grounds I think the supplemental bill for an account by the new trustees, the tenant for life, and tenant of the inheritance was properly brought. The trustees were the proper persons to file the bill against the late marquis, and the present plaintiffs were the proper persons to file the supplemental bill, though one of the plaintiffs was not *in esse* when the first bill was filed, inasmuch as the money produced by the waste is not to be pocketed, but to be laid up for the benefit of those who in succession will take the estate. . . .

## SECTION II TRESPASS.

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### KING v. STUART.

(United States Circuit Court, 1897, 84 Fed. 546.)

Paul, D. J. This is a. suit brought by the plaintiff, Henry C King, to restrain the defendants from cutting and carrying away the timber of the plaintiff on certain lands claimed by him, lying in Buchanan county, Va., the same being part of a tract of 500,000 acres lying in the states of Virginia, West Virginia, and Kentucky. . . .

The first ground of demurrer, viz. "that the plaintiff has a full, complete, and adequate remedy at law, and is, therefore, not entitled to relief in equity for the matters complained of in said bill," presents a clearly defined and important question for decision. A demurrer to a bill in equity admits the truth of the allegations of fact in the bill so far as the same are well pleaded. 1 Fost. Fed. Prac. § 108. The defendants in this cause, by their demurrer, admit the complainant has title to the land mentioned in the bill lying within this district, and that he is in possession of the same. They likewise admit that the defendants have no title to said land; that they are not in possession thereof. They admit that the land is wild and uncultivated; that it is heavily timbered with a valuable growth of poplar, oak, walnut, and other valuable trees, and is practically worthless for agricultural purposes; that it was purchased by the complainant solely on account of the timber; that they have, against the protest of the plaintiff, entered upon said land, and have cut down, and are preparing and threatening to remove a large quantity of valuable walnut and other timber; that they enjoy ready facilities for removing the same out of the state of Virginia into the states of Kentucky and West Virginia. They further admit the facts upon which it is alleged that these trespasses if permitted to continue, will result in permanent and irreparable injury and damage to the land and to the plaintiff. Admitting these facts, the defendants insist that a

court of equity cannot, by injunction, prevent an actual or threatened trespass going to the destruction of the growing timber, and thereby causing irreparable damage to the plaintiff. It has frequently been held by this court, and by the circuit court of appeals for this circuit that pending an action at law to try the title to land, an injunction will lie to prevent the cutting and removal of timber until the question of the title has been determined at law; that the interests of the parties should remain in statu quo pending the litigation of the title. The defendants in this cause insist that, as there is no action pending at law involving the title to the land, an injunction will not lie to prevent the destruction of timber, which the plaintiff alleges will result in irreparable injury to him. The contention of the defendants is that the plaintiff has a full, adequate, and complete remedy at law for any damage he may suffer by reason of the trespasses of which he complains; that this remedy is an action at law for damages, to be measured by the value of the timber removed. That this was the doctrine at common law is admitted, but that its strictness has been greatly modified by the decisions of courts of equity in England and in this country is too well established to admit of discussion. A leading case in this country on this subject is that of Jerome v. Ross, 7 Johns. Ch. 315. In this case Chancellor Kent, while closely adhering to the common-law doctrine, said:

"In ordinary cases, this latter remedy (an action at law) has been found amply sufficient for the protection of property; and I do not think it advisable, upon any principle of justice or policy, to introduce the chancery remedy as its substitute, except in strong and aggravated instances of trespass which go to the destruction of the inheritance, or where the mischief is remediless."

He further says:

"I do not know a case in which an injunction has been granted to restrain a trespasser merely because he was a trespasser, without showing that the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass."

As cautiously and carefully as Chancellor Kent states the law, it seems that his view of the doctrine would cover the case at bar, and entitle the plaintiff to an injunction. But the law of injunction against trespass has, since the decision in Jerome v. Ross, been relaxed and expanded until now it is held that an injunction will lie to restrain

trespass whenever the injury done or threatened would result in irreparable injury, or the defendant is insolvent. It will also be granted where the entire wrong cannot be redressed by one action at law for damages; this on the principle that equity will interpose by injunction to prevent a multiplicity of suits. . . .

The contention of counsel for the defendants that an injunction to prevent the destruction of trees is confined to trespasses which destroy groves kept for beautifying the owner's home or lands, or to shade and ornamental trees, cannot be sustained. The modern decisions apply the relief by way of injunction to coal, iron, and other mines, and to growing timber in a forest. Applying the doctrine laid down in the authorities above quoted, I find no difficulty in deciding that the temporary injunction in this cause was properly awarded, and should be perpetuated. The trespass committed is not a single act, temporary in its nature, and such as might be compensated for by a single action for damages, but is continuous from day to day, and, if permitted to continue, will ultimately result in the entire destruction of the valuable timber admitted to belong to the plaintiff. The damage done to the plaintiff today by cutting his timber is the foundation for an action of damages. The measure of recovery, on the damages laid in the writ in an action brought for this trespass will be the injury suffered by the plaintiff to the time of bringing his suit. Tomorrow the defendant commits further injury by cutting other timber, thus giving the plaintiff another cause of action, and requiring him to bring another suit, if he is to be remitted to his remedy at law, for it is not to be presumed that the plaintiff will stand idly by until the destruction of his property is complete, and, by his acquiescence, perhaps endanger his right to recovery of damages for the injury done him. This statement shows the multiplicity of suits to which the plaintiff would have to resort for redress, and at the same time it shows the futility of the plaintiff's remedy at law,—a remedy which must be full, complete, and adequate. The remedy by an action at law for damages against a trespasser may have been an efficient remedy at common law. But at this day, when property of all kinds readily and easily changes hands; when a man who is solvent today may be insolvent tomorrow; when the ready means of transportation quickly conveys personal property from one section of the country to another, perhaps out of the jurisdiction of the courts which have

been established for the protection of property rights; and when we consider the long delays that often precede a trial, a judgment, and execution,—we see how entirely inadequate is the remedy at law to secure compensation to a person whose property is destroyed by a trespasser. So far from his remedy at law being full, complete, and adequate, he may find himself, at the end of his litigation, with a naked execution in his hands, with no means for its satisfaction. In the meantime his most valuable property interests have been destroyed.

The only remaining question for discussion is: Is the damage that will result to the plaintiff if the defendants are permitted to cut and carry away his valuable timber irreparable? It must be conceded that every man has a right to enjoy his own property in his own way; that he has a right to say how long he will keep it, and when and how he will dispose of it. In the case of a heavily-timbered tract of land, like that of the plaintiff, it is his right to say what part of it, if any, or what particular trees or kinds of trees, he will cut, and what he will leave standing. It is difficult to find any kind of property that will suffer more by unrestrained trespasses, or that is more difficult to be compensated for in damages after its destruction than a forest of growing timber such as the plaintiff's. The trees are increasing in size and value from year to year; the younger trees are constantly reaching nearer the size at which they can be profitably utilized, and are constantly rendering the estate more valuable. Coal and ore, if taken from mines, may be measured as to quantity and value. They have no increasing value by reason of growth, but are of fixed quantity. Yet the removal of coal and ore from mines is held to work irreparable damage to the property of the owner of the mine. The court knows of no measure of damages that could be adopted by a jury that would properly estimate what would be the value of a body of timber five years hence that is destroyed by a trespasser today. The court has no hesitancy in holding that the destruction of the plaintiff's timber by the defendant, as they threaten to do, and were doing when restrained, would result in irreparable damage to the property of the plaintiff, and that the plaintiff is entitled to the protection of a court of equity. . . .

## MURPHEY v. LINCOLN.

(Supreme Court of Vermont, 1891, 63 Vt. 278, 22 Atl. 418.)

THOMPSON, J. . . . The defendants contend that this case is not within the jurisdiction of a court of equity, for the reason that the orator has an adequate remedy at law. The bill charges the committing of several continuous trespasses by defendants by drawing wood and logs from their land across the pasture and meadow land of the orator, and that the defendants threaten to continue to commit these trespasses. The defendants, in their answer, either expressly or tacitly, by their failure to deny them, admit the truth of these allegations. They also claim a right of way across the orator's land to that part of the propagation lot owned by them by the route traveled when they committed the alleged trespasses. These facts bring the case within the jurisdiction of the court of equity. The rule applicable to cases of this kind is stated in 3 Pom. Eq. Jur. §1357, as follows: "If the trespass is continuous in its nature, if repeated acts of wrong are done or threatened, although each of these acts taken by itself may not be destructive, and the legal remedy may, therefore, be adequate for each single act if it stood alone, then also the entire wrong will be prevented or stopped by injunction on the ground of avoiding a repetition of similar actions." The use of this way across the orator's land by defendants under a claim of right, if continued long enough would ripen into an easement. Equity will interfere to enjoin such wrongful acts, continued or threatened to be continued, to prevent the acquisition of an easement in such a manner. . . .

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## LADD v. OSBORNE.

(Supreme Court of Iowa, 1890, 79 Iowa 93, 44 N. W. 285.)

ROTHROCK, C. J. . . . It is claimed that the proof does not establish the facts that the defendant repeatedly opened the fences and traveled across the premises, and that it affirmatively appears

that he is not insolvent, and that there is no ground for equitable interference by injunction for what was merely an action at law for trespass. The right to an action in equity, restraining the removal of fences and opening up highways, the cutting down of shade trees, or any other threatened invasion, use or occupation of the land of another, has been too long established in this state to be now called in question. In City of Council Bluffs v. Stewart, 51 Iowa, 385, it was said that "Courts of equity will, under certain circumstances, interfere by injunction to prevent trespasses upon real estate; but to authorize such interference there must exist some distinct ground of equitable jurisdiction, such as the insolvency of the party sought to be enjoined, the prevention of waste or irreparable injury, or a multiplicity of suits." See, also Bolton v. McShane, 67 Iowa, 207, and cases there cited. In the case at bar the evidence shows that there had been for some time contention between the parties as to whether a public road existed over plaintiff's land. The defendant contended that there was a public highway, and he more than once opened the plaintiff's fences, and traveled over the land, and threatened to continue to do so. The plaintiff was not required to institute an action at law for every act of trespass, but, to avoid a multiplicity of suits, it was his right to have relief in equity by injunction, regardless of whether the defendant was solvent or insolvent. . . .

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## STARR v. WOODBURY GLASS WORKS.

(New Jersey Court of Chancery, 1901, 48 Atl. 911.)

Bill by Lewis Starr against the Woodbury Glass Works for an injunction to prevent the running of oil on plaintiff's premises.

Injunction advised. . . .

Grey, V. C. The complainant owns and is in possession of a piece of meadow and pasture land in Woodbury adjoining the property where the defendant has located its glass works, in which it uses large quantities of crude kerosene oil. All the affidavits show that the waste from the use of this oil was by the defendant permitted to flow over and upon the complainant's lands. That the presence of such material upon a meadow is destructively injurious, fouling the

waters, and ruining the vegetation, goes without saying, but is also proven without denial. The affidavits annexed to the bill of complaint, together with the contents of a bottle containing a sample of the water on complainant's lands, offered as an exhibit, show the condition of his premises immediately before the filing of the bill in this cause. These exhibit a foulness which is wholly impossible in nature, rendering the flowing water worse than useless for any purpose. This condition is shown by the defendant's letters of explanation and denial, and substantially by the affidavits it offers, to be attributable to the overflow of waste oil and oil water from defendant's premises over to and upon the complainant's land. The defendant's affidavits do not deny that the waste oil thus came over upon complainant's lands, nor that if fouled the waters there flowing. The defendant practically admits that it has done the injury complained of, but it declares that it has so arranged its use of the oil that since July, 1900, there has been no overflow of oil waste. It does not seem to be possible that an oil so volative and difficult to retain as kerosene could be found, just before the filing of the bill, deposisted in such great quantity, when there had been no overflow for more than eight months. In such a period the previous deposit lying open to the weather and on the surface of the earth, would either have evaporated or percolated out of sight. The proof is that it is presently on complainant's of his property for which no adequate satisfaction can be given. It is a continuing injury to his property right. He cannot use his meadow for pasture, he cannot cultivate his lands, his stock cannot be watered in the ditch or stream. For such inconvenience, vexation, and deprivation no damages that could be recovered would afford any adequate satisfaction. There is the less reason to hesitate to allow an injunction in this case because there is no denial by the defendant that the waste material has flowed from the defendant's lands upon the complainant's premises, nor is there any claim of any right to maintain such an overflow. The denial is limited to the claim that the defendant has now so fixed its works and the use of the oil that the injury does not continue. This claim is not sustained, but, if it be true, the injunction cannot harm the defendant, as it will only prohibit the permittance of future foul overflows, and this the defendant contends it has already arranged; whereas, if it be false, and no writ is allowed, the admitted injury to the complainant's premises will continue. I will advise the allowance of an injunction.

## CROCKER v. MANHATTAN LIFE INS. CO.

(Supreme Court of New York, 1900, 31 N. Y. Misc. 687, 66 N. Y. Supp. 84.)

LAWRENCE, J. . . . I am of the opinion, also, that the evidence establishes that from the roof of the defendant's building to the roof of the plaintiff's building, at the Broadway end, the defendant's north wall overhangs the plaintiff's true southerly line by 3½ inches at the first cornice, at the second cornice 3¾ inches, and at the third cornice 4¾ inches; also, that the defendant's northerly wall extends over the plaintiff's southerly boundary line at the New-street end 1⅛ inches, at the roof of the plaintiff's building, and that from that point the defendant's wall is plumb. Upon this state of facts, as the principal encroachment is in the air, I am of the opinion that the case which is presented is purely one for compensation, and that, as this action has been brought upon the equitable side of the court, while the plaintiff should be afforded proper compensation it would be most unjust to the defendant to order it to take down the northerly wall of its building, or such part as may be necessary to remove the encroachment. The evidence shows that to take down that wall would subject the defendant to enormous expense, without conferring upon the plaintiff any corresponding benefit. The principal encroachment is at a great height, and it is questionable, on the evidence, whether it will materially lessen the rental or fee value of the plaintiff's property. It is conceded by the defendant that the ornamental cornices and swinging iron shutters project over the plaintiff's southern boundary line. The shutters were placed there, as is claimed by the defendant, in obedience to chapter 275 of the Laws of 1892 (section 491). The defendant offers to enter into any obligation which may be required to show that it makes no claim in consequence of the location of the shutters and cornices, to have acquired a permanent right to keep them in their present location, or to obtain an easement in respect to them in the plaintiff's land. I conclude, therefore, that the proper judgment to be rendered in this case will be to enjoin the defendant from continuing the cornices and shutters in their present position whenever the plaintiff or his grantees shall require them so to do, if the plaintiff or his grantees should desire to build upon the premises known as "No. 70 Broadway." The defendant should also be required to execute an

instrument, to be approved of by the court, declaring that it makes no claim to any right to have said cornices and shutters remain permanently in their present position. The plaintiff, too, is entitled to be compensated for the damages which he has sustained by reason of the encroachment of the defendant upon his boundary line, as above stated. On the evidence before me, it is most difficult to determine what that compensation should be, but, after considering the expert testimony produced by the parties, I have reached the conclusion that $5,000 would not be an excessive amount to be paid by the defendant to the plaintiff. The judgment will provide, however, that the plaintiff shall execute and deliver to the defendant, upon the receipt of that sum, a release for all damages which he may have sustained by reason of the encroachment. If that is declined by the plaintiff, then, as it is not always incumbent upon the court to grant an injunction where its allowance would produce vast injury to the defendant without corresponding benefit to the plaintiff, I think that I ought, in the exercise of my discretion, to refuse the plaintiff equitable relief, and remit him to his action at law. Amerman v. Deane, 132 N. Y. 355, 30 N. E. 741; Garvey v. Railroad Co. 159 N. Y. 323, 333, 54 N. E. 57; McSorley v. Gomprecht (Super. N. Y.) 26 N. Y. Supp. 917, and cases cited. Draw decision and judgment in accordance with these views, and settle on three days' notice.

Judgment accordingly.

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## BOECKLER v. MISSOURI PACIFIC RY. CO.

(Misouri Court of Appeals, 1881, 10 Mo. App. 448.)

Thompson, J. . . . A court of equity will never grant an injunction to restrain a trespasser upon real property merely because he is a trespasser; the trespass threatened and committed must be of a nature permanently to injure or destroy the inheritance, or otherwise inflict such irreparable mischief as is not susceptible of adequate compensation by way of pecuniary damages. Weigel v. Walsh, 45 Mo. 560; Burgess v. Kattleman, 41 Mo. 480; James v. Dixon, 20 Mo. 79. Under this rule, an injunction was granted, where the trespass was such as would destroy the plaintiff's dwelling-house or render

it unfit for habitation. Echelkamp v. Schrader, 45 Mo. 505. It was also granted in another case to restrain a railroad company from operating its road over the plaintiff's land, unless it should pay into court the damages assessed for the taking of the land, the company being insolvent. Evans v. Railroad Co., 64 Mo. 453. And, it may be added that courts of equity will generally interfere to restrain trespasses threatened by persons who are insolvent, because, in such a case, an action for damages would obviously afford no adequate remedy. But there is no suggestion in the record that the defendant in this case is insolvent.

How does the present case stand with reference to these principles? Stating it most strongly in favor of the plaintiff, it may be assumed that the plaintiff has long been the owner of a lot of ground in South St. Louis, which fronts on the Mississippi River, and which is chiefly valuable for that reason; that in 1872, defendant's grantor, the Pacific Railroad, tortiously entered upon this lot and built a railway spur or side track diagonally across it, upon a trestle-work, about twelve feet high; and that the defendant's grantor, the Pacific Railroad, and the Atlantic and Pacific Railroad Company, under a lease from the Pacific Railroad, and since the beginning of the year 1877, the defendant itself, have been using this track by running trains back and forth over it at frequent intervals,—and all this without the consent of the plaintiff and against her will, and without having condemned and paid for the land as required by the laws of this state.

What more is this than a partial or total disseisin of the plaintiff, for which she may have adequate compensation in an action at law for damages? There are here none of the elements which are found in cases where courts have enjoined trespasses upon real property; no severing from the realty and carrying away of valuable timber, stone, or ores; no injury to the inheritance; no destruction or invasion of the plaintiff's habitation; no insolvency of the defendant. Without intimating an opinion whether it is a proper case for ejectment, it is clear that she may maintain an action for the damages which she has sustained through the trespass; or that, waiving the tort, she may maintain an action as on an implied contract for the rental value of the premises during the time the defendant has thus occupied them. We see nothing in the facts of this case to distinguish it in principle from the constantly recurring case where one man tortiously occupies the

vacant land of another, puts a dwelling-house or other building upon it, and goes in and out of it by himself and his servants from day to day. In such a case, if nothing further appears, it is clear that an injunction will not be awarded; for to do so would be to substitute the discretion of the judge in a suit in equity for the verdict of a jury in an action of trespass or ejectment—a thing which our law does not countenance.

"Where the trespass complained of," says Mr. High, "consists in the erection of buildings upon the complainant's land, a distinction is taken between the buildings when in an incomplete, and when in a finished state. And while the jurisdiction is freely exercised before the completion of the structures, yet if they have been completed, the relief will generally be withheld, and the person aggrieved will be left to his remedy by ejectment." 1 High on Inj. (2d.), sect. 707. We do not perceive a distinction in principle between the case of the erection of a building, and the erection of a side-track by a railway company.

Nor do we think this is a case for this relief on the ground that the trespass is continuous in its nature. We agree with the learned judge of the Circuit Court, in the opinion delivered by him, that "the continuous character of the trespass is a fact to be regarded, but it is not sufficient in itself, without other circumstances, to authorize injunctive relief." It is obvious that if that were not so, any continuing dispossession by a trespasser would authorize an injunction, and the remedy would thus become a complete substitute for ejectment. . .

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## TURNER v. STEWART.

(Supreme Court of Missouri, 1883, 78 Mo. 480.)

Martin, C. This was a petition for an injunction, the substance of which we recite. The plaintiff states that he is the owner and in possession of a private wharf and landing on the west side of the Osage River; that he is engaged in operating a saw-mill and machine for loading and unloading cars with railroad ties, which mill and machine he has erected on said premises at great expense; that he is under contract to furnish and deliver a large amount of lumber to different parties, and that he has a large number of hands in his em-

ployment conducting his said business; that the defendants are the owners and proprietors of a steamer called the "Aggie;" that without the consent of plaintiff and against his notice forbidding it, said defendants have at divers times since the 7th day of May, 1880, landed their said steamer at said landing and discharged freight on said premises, and that they threaten to repeat and continue said unlawful acts and trespasses; that by reason thereof the business of plaintiff in sawing, receiving and delivering lumber, and loading and unloading railroad ties is wholly suspended and stopped during the time of said acts and trespasses; that defendants are in the habit of landing and discharging freight and thereby interfering with and suspending the said business of the plaintiff as often as two or three times each week, varying from a half day to a whole day; that he is damaged to such an extent that an ordinary action at law would be a wholly inadequate remedy for the injury sustained, and that a continuation of said acts would work an irreparable damage for which a court of law provides no adequate remedy; wherefore the order of the court enjoining defendants from further trespasses aforesaid is asked by plaintiff, and such other and further relief as he may be entitled to.

To this petition the defendants filed a demurrer for want of facts sufficient to constitute a case of action. It is urged that an injunction will not be granted to restrain trespasses unless the parties are insolvent or the injury irreparable. It is also insisted that the jurisdiction of the matter complained of belongs to the courts of admiralty and not to the State courts. The court sustained the demurrer and thereupon entered final judgment dismissing the petition, from which action of the court the plaintiff presents his writ of error.

It is not necessary that the defendant should be insolvent or the wrong irreparable to sustain the right to equitable relief against trespasses. It is provided in our statute that "the remedy by writ of injunction shall exist in all cases when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." R. S. 1879. §2722. The business of the plaintiff was constantly interrupted at the pleasure of the defendants. He was subjected to a grievance recurring at irregular intervals. His immediate damages would be difficult to estimate on account of the nature of his business. For consequential damages and loss of profits on his contracts it would be difficult if not

impossible to obtain anything in an action at law. It is also clear that no single action for damages would afford him redress. He would have to sue for every time the defendant landed; and the burden of carrying on such a multiplicity of law suits would make his remedy about as grievous as the injury. Under this statute and the decisions construing it, I am satisfied the plaintiff was entitled to the remedy asked for, and that a suit at law would not be an adequate remedy. . .

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## DEES v. CHEUVRONTS.

(Supreme Court of Illinois, 1909, 240 Ill. 486, 88 N. E. 1011.)

This was a bill for injunction filed to the March terms, 1908, of the circuit court of Crawford county by appellees, to restrain the appellants, their agents, servants, employees, successors and assigns, from drilling for oil or gas on one acre of land situated in the south-west corner of the south-east quarter of the south-west quarter of section 21, township 7, north, range 13, west, in said county. . . .

From the facts set out in the bill it appears that Daniel G. Dees and Viola Dees conveyed by warranty deed to the school trustees of said township, November 5, 1878, a certain described one-fourth of an acre of land, "so long as is kep for school perpesis hold said possession in the school trustees after it is not use said perpice is to come to said Daniel G. Dees or his heirs or assigns." The same grantor gave to the same grantees a quit-claim deed May 3, 1892, to one acre in the south-west corner of said quarter-quarter section, stating therein: "This deed made to the trustees of schools so long as it shall be used as a school house site, and whenever it shall be discontinued as a school house site then to revert to the grantors." It is agreed that this last named acre included within its boundaries the one-fourth of an acre conveyed in the former deed. The bill set forth that since the execution of said deeds the property has been held by the school trustees and used for the purposes provided in said deeds; that on May 3, 1902, the school directors of school district No. 7, (which includes said land,) and the said school trustees of said township, signed a lease with C. F. Kimmel, one of the appellants, under which Kimmel claims the right to go upon said land and drill for and remove oil and

gas; that the drilling for oil and the removal of the same from said tract of land is not the using of said land for the purpose for which it was granted to said school trustees, and would result in irrevocable injury to said land and to the possible reversion of appellees. . . .

CARTER, J. The first question presented for consideration is the nature of the interest that appellees have in this land. The deeds in question created in the grantees a base or determinable fee, and the only right left in the grantor was not a vested future estate in fee, but only what is called "a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs." (North v. Graham, 235 Ill. 178; Presbyterian Church v. Venable, 159 id. 215; O'Donnell v. Robson, 239 id. 634.) Under these decisions it must be held to be the settled law of this State that the interest of appellees in the land in question was only a possibility of reverter. It then remains for us to consider whether this was such an interest as entitles the appellees to the relief prayed for and allowed in the trial court.

It is not alleged in the bill or contended in the brief that the land in question is not still used as a school house site, or that the exercise of the right granted by the lease to Kimmel to go on said land and drill for oil would in any way interfere with such use of the land. Apparently appellees have not filed their bill for the purpose of having this base fee determined by the court on the ground that it had been defeated by non-compliance with the conditions in the said deed. Appellees seek rather through a court of equity to direct said school trustees and directors as to the use of said property. On this record it must be held that the land is still used for the purposes set out in the deeds and that the title to the estate granted by said deeds is still held by the trustees of schools. This court, in Gannon v. Peterson, 193 Ill. 372, stated that equity would interfere to enjoin equitable waste by the owner of a base or determinable fee only when it is made to appear that the contingency which will determine the fee is reasonably certain to happen and the waste is of such character that a court of equity can say that the party is charged with a wanton and conscienceless use of his rights, and we there held that equity would not enjoin the owner of a base fee from leasing coal mining privileges. The doctrine laid down in that case was re-affirmed in Fifer v. Allen, 228 Ill. 507.

We are compelled to hold that appellees have shown no present estate in the land,—nothing but an expectancy; a mere possibility of

reverter; a right not now capable of being valued. No estate is vested in appellees and none may ever vest. A court of equity, in its ordinary jurisdiction, cannot protect a mere expectancy.

The decree of the circuit court is reversed and the case remanded to that court, with directions to enter a decree dismissing the bill.

Reversed and remanded, with directions.

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## WARLIER v. WILLIAMS.

(Supreme Court of Nebraska, 1897, 53 Neb. 143.)

RAGAN, C. In the district court of Burt County, John Warlier brought this suit in equity against Charles Williams and others, alleging, in substance, in his petition that he was the owner, and in the actual possession, of a certain tract of land described in said petition; that, at the time of the conveyance of said land by the government of the United States to his grantor, the Missouri river constituted one of its boundaries; that the tract conveyed by the United States government since that time has been enlarged by accretions from said river; that the parties made defendants, against his protest and without any right or color of title or authority, had forcibly entered into possession of the lands formed by said accretion; had "squatted" thereon; and, at the bringing of the suit, were using and cultivating said lands and appropriating to themselves the crops grown thereon; that said defendants and each of them were wholly insolvent; that if they were permitted to remain in possession of said land for ten years they would acquire title thereto by adverse possession. The prayer was that the defendants might be enjoined from continuing in possession of said lands. To this petition the district court sustained a general demurrer and dismissed Warlier's action, and he brings this judgment here for review on error.

The proceeding is, in effect, an application to a court of equity for a mandatory injunction to remove the defendants in error from the real estate of the plaintiffs in error upon which they have forcibly and wrongfully entered and are wrongfully occupying. Counsel for the plaintiff in error has cited us to numerous cases which he claims sustain his right to this extraordinary remedy; but an examination of

all these cases discloses that not one of them is in point. A litigant cannot successfully invoke the extraordinary remedy of injunction to enforce a legal right unless the facts and circumstances in the case are such that his ordinary legal remedies are inadequate,—that it, that the pursuit of those remedies, or some of them, will not afford him as prompt and efficacious redress as the remedy by injunction. This we understand to be elementary law. (Richmond v. Dubuque & S. C. R. Co., 33 Ia. 422; Jerome v. Ross, 7 Johns. Ch. (N. Y.) 315; Pomeroy, Equity Jurisprudence, secs., 221, 275, 1346, 1347, 1357.) Now the facts stated in the petition of the plaintiff in error show simply this: That the defendants in error have forcibly entered upon and are occupying his real estate. The plaintiff in error has the legal title and is in possession of this real estate. He might then institute against these defendants in error an action of forcible entry and detainer under chapter 10 of the Code of Civil Procedure, section 1020 of which expressly provides that such an action may be brought against a defendant who is a settler or occupier of lands without color of title and to which the complainant in the forcible detainer suit has the right of possesion. Here, than, is a plain statutory remedy for the wrong of which the plaintiff in error complains in this action. Is this remedy an adequate one? The statute provides that this action of forcible entry and detainer may be brought before a justice of the peace after giving the parties in possession of the lands three days' notice to quit; that no continuance for more than eight days shall be granted in the case unless the party made defendant shall give bond for the payment of rent, and if the judgment shall be entered in favor of the plaintiff, a writ of restitution shall be awarded in his favor, unless appellate proceedings are taken by defendants, in which case they shall give a bond to pay a reasonable rent for the premises while they wrongfully detain the same. This remedy is not only an adequate one but it is a summary and a speedy one. The relief demanded by the plaintiff in error in this injunction proceeding is the ousting of the plaintiff in error from his real estate so that he may have the exclusive possession of it. A judgment and a writ of restitution in a forcible entry and detainer suit would afford him the same and a more speedy redress than a proceeding by injunction. But it is said by the plaintiff in error that he is entitled to pursue the injunction remedy because of the insolvency of the defendants in error. This argument, as applied

to this case, is untenable. If the defendants in error are insolvent, then the plaintiff in error has no redress for the costs and expenses that he may incur in prosecuting either an injunction suit or a forcible entry and detainer suit. Another argument is that the proceeding by injunction will avoid a multiplicity of suits. This argument we also think untenable. We do not understand the mere fact that there exist divers causes of action which may be the foundation of as many different suits between the parties thereto is a ground upon which equity may be called upon to assume jurisdiction and settle all such matters in one suit. (Chief Justice Beck in Richmond v. Dubuque & Sioux City R. Co., supra.) The district court was right and its decree is

Affirmed.

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## OWENS v. CROSSETT.

(Supreme Court of Illinois, 1883, 105 Ill. 354, 357.)

Walker, J.—This was a bill in equity, filed by appellants, to enjoin appellee from removing the fence on the opposite sides of a field, where it is claimed a road enters and passes through the field. Complainants deny that there is any regular, legally laid out or established road that passes through the field, and defendant claims there is, and justifies his acts on the ground that he is a road commissioner, and has the right and that it is his duty, to remove the fence as an obstruction, and keep the road open and free to travel by the public. These are the grounds of the controversy.

It is first urged in affirmance of the decree dismissing the bill, that it will not lie to enjoin a trespass. Such is undoubtedly the rule where it is a simple trespass to property, and is but a single act, and the person committing or threatening the trespass is able to respond in damages; but where he is insolvent, and repeated trespasses of a grave character are threatened to be repeated, equity will interfere to prevent the wrong, by restraining the threatened trespass. Here, the fence had been removed a considerable number of times, and it is admitted that defendant had said he would, and intended to, remove it as often as it should be replaced, and that he has no property subject to execution. This brings the case within the exception to the

general rule, and authorized the court to entertain jurisdiction of the case, because there was not an adequate remedy at law, and also to prevent a multiplicity of suits at law. . . .

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## HATTON v. KANSAS CITY, ETC., R. R.

(Supreme Court of Missouri, 1913, 253 Mo. 660, 160 S. W. 227.)

FARIS, J. This is a proceeding in equity whereby plaintiffs seek to enjoin the defendant from entering certain real estate, averred in the petition to be an abandoned right of way of defendant, and removing therefrom certain right-of-way fences, steel rails, ties, bridges, abutments and cattle guards.

The proof does not disclose wherein the railroad track or the right of way in question, or the rails in controversy, differ from any other track, or right of way or rails. Regardless of whether in the absence of a motion to make more definite and certain the statement in the petition herein that the damage accruing to plaintiffs is irreparable, is as a conclusion of law sufficient here (regard being had to the form of the attack on the petition), we are yet met by the fact that it is incumbent on plaintiffs when they come to make out their case to show by testimony that their damage will in fact be irreparable.

It is true that our statute permits the use of the remedy by injunction in all cases where "an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." (Sec. 2534, R. S. 1909.) It would be clear to us even if counsel for plaintiffs had not ingenuously and candidly admitted it, that the real controversy here is over the rails, and such other property, if any such there be of value, now remaining on the old right of way. Many cases occur to us wherein the necessity of an interference by injunction might arise within the purview of this section. For example, in case of the threatened loss or destruction of personal property, as a wedding present or an heirloom having a special or affection value, but whose real value is negligible, or out of proportion to the esteem in which the owner holds it; or in case of the entry upon lands and the threatened destruction of shade trees. These, we opine, as well as many others of similar

sort, would be special reasons taking the case out of the general rule and bringing it within the statute. (McPike v. West, 71 Mo. 199.) But nothing is clearer than that when we pass beyond the usual domain of equity, but invoke its interference because of some other sort of threatened irreparable injury, or lack of an adequate remedy by an action for damages, the special reasons must be shown by the proof. That is what the statute itself says in effect. The proof must follow the allegations of the petition and create in the mind of the chancellor the opinion that "an adequate remedy cannot be afforded by an action for damages." (Weigel v. Walsh, 45 Mo. 560.) There is no such proof in this record. Defendant is not shown or averred to be insolvent. If there has been by abandonment, a reverter of the right of way to the grantor thereof, or to the assignee of the grantor, and defendant enter thereon, will not such entry constitute an actionable trespass? If defendant take up and carry away and convert to its own use the rails upon said right of way, will not an action lie for conversion, if it be true that the title to these rails has for any reason passed to plaintiffs? There is naught in the proof, or for that matter in the petition either to negative either of these propositions. . . .

## SECTION III, PRIVATE NUISANCE.

### RANKIN v. CHARLESS.

(Supreme Court of Missouri, 1854, 19 Mo. 490.)

Scott, J. . . . The verdict establishes the fact, that the defendant has unlawfully made use of the building of the plaintiff as a support to the joists of his house, and the only question that arises is, what remedy or judgment is warranted in law by the verdict of the jury? The present practice act having blended the jurisdiction of courts of law and equity, it would seem that the

plaintiff is entitled, in this proceeding, to all the relief that would formerly have been afforded both by a court of law and equity.

According to the definition of a nuisance, which is said to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damages to the possession or easement of his neighbor, or to a public easement, it may be questioned whether the injury complained of is a nuisance or not. Gibbon, 360. A purpresture is a species of nuisance, but that term is only applied to an encroachment on land belonging to the public. Coke, 177. But, although the act complained of may not be a technical nuisance, to be redressed by the remedies appropriate by law for that species of wrong, yet it is clearly an injury, entitling the party affected by it to an action for its redress.

The record in this case only presents the petition of the plaintiff, the answer of the defendant, and the verdict and judgment. The petition substantially alleges that the defendant, in building his house, used the wall of the plaintiff's house, (who was building simultaneously,) for a support to the joists of his building. The defense, was a license to use the wall. The verdict of the jury awarded damages to the plaintiff for the act complained of.

It seems that, in the opinion of the court below, an erroneous judgment was entered on this verdict, and so much of it as decreed that the joists be removed from the wall, that the holes made by the insertion of the joists, be filled with brick and mortar, as strongly as it may be done, and that the plaintiff have execution against the defendant in conformity to this judgment and decree, was stricken out, and it was thus left a judgment for the damage assessed.

Even if the injury complained of was a nuisance, yet it is well known that, in an action on the case, for such a wrong, no judgment for the abatement of it is given. That judgment was only proper in the old writ of assize of nuisance, and in a *quod permittat prosternere.* 3 Black. 219. But these ancient remedies have fallen into disuse, if they have not been abolished, and the action on the case, and the writ of injunction are now the usual remedies for a nuisance. But courts of equity do not, as a matter of course, interfere in all cases of this kind. That interposition can only be demanded to restrain irreparable mischief, or to suppress oppressive or interminable litigation, or to prevent a multiplicity of suits.

No injunction will be granted unless the act done or contemplated is, or will clearly be, a nuisance. If a party sees a nuisance in progress, and does not interfere to prevent it, he will forfeit his right to assistance from a court of equity. Jones v. Royal Canal Co., 2 Molloy, 319; Williams v. Earl of Jersey, 1 Craig & Phillips, 91; Gibbon on Nuisances, 403.

As the record is barren of all the circumstances attending this transaction, no reason is perceived why if the extraordinary powers of a court of chancery are exerted in this case, they may not in every complaint of a nuisance. It is allowable for a party to take the redress of wrongs of this character into his own hands. This was a case eminently proper for the exercise of such a right. Had the injury been redressed by the party at the moment it was done, the consequences would have been by no means so serious as they must be at this time, by granting the relief prayed. The injury has been done. It cannot now be prevented. It may be redressed.

Whether it would be more equitable to let it remain, and leave the plaintiff to his remedy at law, we cannot say, as the facts necessary to a determination of that question are not before us. To tear down the house of the defendant now, might look more like revenge than the legal reparation of an injury. It is no part of the business of tribunals of justice to minister to the angry passion of men. If the defendant will wantonly persist in his encroachments on the rights of the plaintiff, it is in the power of the courts of law to award such damages as will arouse him to a sense of his continued injustice.

The other judges concurring, the judgment is affirmed.

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## WHIPPLE v. McINTYRE.

(Court of Appeals of Missouri, 1896, 69 Mo. App. 397.)

Bland, P. J. William A. Whipple brought this suit against Robert J. McIntyre for keeping upon his lot a pig pen so near to the dwelling house of Whipple as to be injurious to the health and to detract from the comfort of Whipple and his family. . . .

The petition was treated as a bill in equity, as for injunction, and was so tried before the court. After the evidence was all in, the court

entered a judgment dismissing the bill for want of equity. The allegation of damages was ignored throughout the trial and no finding was made upon that issue. This was a misconception of the cause of action, as stated in the petition. The action is for damages on account of the alleged nuisance, and a prayer for injunction to prevent its continuance. The petition does not join two separate causes of action in one count. It states but one cause of action (the maintenance of a private nuisance), and asks double relief, the assessment of damages, and the injunctive process of the court to prevent the continuance of the nuisance, from which damages would continue to daily accrue. In Ware v. Johnson, 55 Mo. 500, it is intimated that this lands in considerable quantities, and that the overflow has continued up to the filing of the bill, and that it could come from no other source. The weight of the evidence supports this view. The injury to the complainant is irreparable not in the sense that no amount of money could compensate him for it, but as a deprivation of the enjoyment may be done. Judge Bliss in his work on Code Pleading, speaking of cases of this kind, says: "The double relief is improperly spoken of as a union of two causes of action, . . . Under the Code there is but one count, and one form of action, and by a single complaint the aggrieved party may have all the relief to which he is entitled." Bliss, Code Pleading (2 Ed.), secs. 166,167,168,169,170,171.

The evidence in this case abundantly establishes the fact that McIntyre maintained on his premises a hog pen, within a few feet of Whipple's dwelling house, and was maintaining it at the date of the trial. That noxious and offensive odors from this pen polluted the air (when allowed to circulate) in the rooms of Whipple's dwelling, is clearly and abundantly proven. That a pigsty, situated as this was, with reference to Whipple's residence, was a nuisance *per se*, scarcely needs authority to support the proposition. Ordinary experience and observation is sufficient to convince any one, with his olfactory nerves in a normal condition, that a pig pen, within fourteen to eighteen feet of a dwelling house, with windows and doors opening upon it, would materially interfere with the ordinary comforts and conveniences of human existence. This, according to modern law, is sufficient to constitute a private nuisance. Webb's Pollock on Torts, 496. But we have judicial authority for pronouncing McIntyre's pigsty a nuisance *per se*. Broder v. Gaillard, 45 L. J. Ch. 414; Reinhart v. Mentasti,

58 L. J. Ch. 787; Webb's Pollock on Torts, 500; Kirchgraber v. Lloyd, 59 Mo. App. 59, and authorities therein cited; 2 Wood on Nuisances, pp. 792, 793.

It is contended by respondent that appellant can not invoke the injunctive process of the court, until he has first established his right by law. This doctrine is supported by many cases, but it has no application in a case like this where the law denounces the thing complained of as a nuisance *per se*. McDonough v. Roberts, 60 Mo. App. 156, and authorities cited. The law has pronounced in advance, in this case, the pig pen, situated as this one is, with reference to appellant's dwelling, a nuisance. The verdict of a jury finding it to be what the law has already pronounced it to be, would establish no legal right that appellant did not have before the verdict.

Under the evidence and pleading, the plaintiff was entitled to his assessment of damages, but for a nominal sum only, as no particular damages were proven. Following the spirit of the law as laid down by Judge Sherwood in Paddock v. Somes, 102 Mo. 226, we reverse the judgment and remand the case, with directions to the circuit court to enter judgment for plaintiff for one cent damages, and to perpetually enjoin and restrain defendant from further maintaining the nuisance in question.

All concur. Judge Biggs in the result.

Biggs, J. (Concurring).—The opinion holds that the action is at law for damages with a prayer for injunctive relief. I concur in this. I also concur in the direction to enter a judgment for plaintiff for nominal damages, and for the abatement of the nuisance, for the reasons: first, that the undisputed physical facts prove that the pigstry, however clean it might have been kept, was in such close proximity to the plaintiff's dwelling house as necessarily to render it a nuisance; and second, that counsel for plaintiff stated at the argument that the main object of the suit was to abate the nuisance, and not to recover substantial damage. The case of Paddock v. Somes, 102 Mo. 226, furnishes no authority whatever for the disposition made of the case.

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## GILES v. WALKER.

(Supreme Court of Judicature, 1890, 24 Q. B. D. 656.)

Appeal from the Leicester County Court.

The defendant, a farmer, occupied land which had originally been forest land, but which had some years prior to 1883, when the defendant's occupation of it commenced, been brought into cultivation by the then occupier. The forest land prior to cultivation did not bear thistles; but immediately upon its being cultivated thistles sprang up all over it. The defendant neglected to mow the thistles periodically so as to prevent them from seeding, and in the years 1887 and 1888 there were thousands of thistles on his land in full seed. The consequence was that the thistle seeds were blown by the wind in large quantities on to the adjoining land of the plaintiff, where they took root and did damage. The plaintiff sued the defendant for such damage in the county court. The judge left to the jury the question whether the defendant in not cutting the thistles had been guilty of negligence. The jury found that he was negligent, and judgment was accordingly entered for the plaintiff. The defendant appealed.

*Toller,* for the defendant. The facts of this case do not establish any cause of action. The judge was wrong in leaving the question of negligence to the jury. Before a person can be charged with negligence, it must be shown that there is a duty on him to take care. But here there is no such duty. The defendant did not bring the thistles on to his land; they grew there naturally. (He was stopped by the Court.)

*R. Bray,* for the plaintiff. If the defendant's predecessor had left the land in its original condition as forest land the thistles would never have grown. By bringing it into cultivation, and so disturbing the natural condition of things, he caused the thistles to grow, thereby creating a nuisance on the land just as much as if he had intentionally grown them. The defendant, by entering into occupation of the land with the nuisance on it, was under a duty to prevent damage from thereby accruing to his neighbour. The case resembles that of Crowhurst v. Amersham Burial Board, 4 Ex. D. 5, where the defendants were held responsible for allowing the branches of their yew trees to grow over their boundary, whereby a horse of the plaintiff, being placed at pasture in the adjoining field, ate some of the yew twigs and died.

LORD COLERIDGE, C. J. I never heard of such an action as this. There can be no duty as between adjoining occupiers to cut the

thistles, which are the natural growth of the soil. The appeal must be allowed.

Lord Esher, M. R. I am of the same opinion.

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## STURGES v. BRIDGMAN.

(In Chancery, 1879, 11 Ch. Div. 852, 862.)

Theisiger, L. J. The Defendant in this case is the occupier, for the purpose of his business as a confectioner, of a house in Wigmore Street. In the rear of the house is a kitchen, and in that kitchen there are now, and have been for over twenty years, two large mortars in which the meat and other materials of the confectionery are pounded. The Plaintiff, who is a physician, is the occupier of a house in Wimpole Street, which until recently had a garden at the rear, the wall of which garden was a party-wall between the Plaintiff's and the Defendant's premises, and formed the back wall of the Defendant's kitchen. The Plaintiff has, however, recently built upon the site of the garden a consulting-room one of the side walls of which is the wall just described. It has been proved that in the case of the mortars, before and at the time of action brought, a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room, and which, unless the Defendant had acquired a right to impose the inconvenience, would constitute an actionable nuisance. The Defendant contends that he had acquired the right, either at Common Law or under the Prescription Act, by uninterrupted user for more than twenty years.

In deciding this question one more fact is neccessary to be stated. Prior to the erection of the consulting-room no material annoyance or inconvenience was caused to the Plaintiff or to any previous occupier of the Plaintiff's house by what the Defendant did. It is true that the Defendant in the 7th paragraph of his affidavit speaks of an invalid lady who occupied the house upon one occasion, about thirty years before, requested him if possible to discontinue the use of the mortars before eight o'clock in the morning; and it is true also that there is some evidence of the garden wall having been subjected to vibration, but this vibration, even if it existed at all, was so slight, and the complaint, if it could be called a complaint, of the invalid lady, and can be looked upon as evidence, was of so trifling a character, that, upon the maxim *de minimis non curat lex,* we arrive at the con-

clusion that the Defendant's acts would not have given rise to any proceedings either at law or in equity. Here then arises the objection to the acquisition by the Defendant of any easement. That which was done by him was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action. Can user which is neither preventible nor actionable found an easement? We think not. The question, so far as regards this particular easement claimed, is the same question whether the Defendant endeavors to assert his right by Common Law or under the Prescription Act. That Act fixes periods for the acquisition of easements, but, except in regard to the particular easement of light, or in regard to certain matters which are immaterial to the present inquiry, it does not alter the character of easements, or of the user or enjoyment by which they are acquired. This being so, the laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, *nec vi nec clam nec precario;* for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavors to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence. Upon this principle it was decided in Webb v. Bird (13 C. B. (N. S.) 841) that currents of air blowing from a particular quarter of the compass, and in Chasemore v. Richards (7 H. L. C. 349) that subterranean water percolating through the strata in no known channels, could not be acquired as an easement by user; and in Angus v. Dalton (4 Q. B. D. 162) a case of lateral support of buildings by adjacent soil, which came on appeal to this Court, the principle was in no way impugned, although it was held by the majority of the court not to be applicable so as to prevent the acquisition of that particular easement. It is a principle which must be equally appropriate to the case of affirmative as of negative easements; in other words, it is equally unreasonable to imply your con-

sent to your neighbor enjoying something which passes from your tenement to his, as to his subjecting your tenement to something which comes from his, when in both cases you have no power of prevention. But the affirmative easement differs from the negative easement in this, that the latter can under no circumstances be interrupted except by acts done upon the servient tenement, but the former, constituting, as it does, a direct interference with the enjoyment by the servient owner of his tenement, may be the subject of legal proceedings as well as of physical interruption. To put concrete cases—the passage of light and air to your neighbour's windows may be physically interrupted by you, but gives you no legal grounds of complaint against him. The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action. Webb v. Bird and Chasemore v. Richards are not, therefore, direct authorities governing the present case. They are, however, illustrations of the principle which ought to govern it; for until the noise, to take this case, became an actionable nuisance, which it did not at any time before the consulting-room was built, the basis of the presumption of the consent, viz., the power of prevention physically or by action, was never present.

It is said that if this principle is applied in cases like the present, and were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go—say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavory character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith's forge built away from all habitations, but to which, in course of time, habitations approach. We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances; what would be a nuisance in Belgrave Square

would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith's forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equal degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbor, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to the individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes. The Master of the Rolls in the court below took substantially the same view of the matter as ourselves and granted the relief which the Plaintiff prayed for, and we are of opinion that his order is right and should be affirmed, and that this appeal should be dismissed with costs.

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## SAWYER v. DAVIS.

(Supreme Court of Massachusetts, 1884, 136 Mass. 239.)

Bill of Review, alleging the following facts:

The plaintiffs, who were manufacturers in Plymouth, were restrained by a decree of this court, made on October 1, 1881, upon a bill in equity brought by the present defendants, from ringing

a bell on their mill before the hour of six and one half o'clock in the morning; which decree was affirmed by the full court on September 7, 1882. (See Davis v. Sawyer, 133 Mass. 289.) On March 28, 1883, the Legislature passed an act, which took effect upon its passage, as follows: "Manufacturers and others employing workmen are authorized, for the purpose of giving notice to such employees, to ring bells and use whistles and gongs of such size and weights, in such manner and at such hours as the board of aldermen of cities and selectmen of towns may in writing designate." (St. 1883, c. 84). On April 18, 1883, the selectmen of Plymouth granted to the plaintiffs a written license to ring the bell on their mill in such manner, and at such hours, beginning at five o'clock in the morning, as they were accustomed to do prior to the injunction of this court.

The prayer of the bill was that the injunction might be dissolved, or that the decree might be so modified as to enable the plaintiffs to act under their license without violating the decree of this court; and for other and further relief.

The defendants demurred to the bill, assigning, among other grounds of demurrer, that the St. of 1883, c. 84, was unconstitutional, so far as applicable to the defendants. . . .

C. Allen, J. Nothing is better established than the power of the Legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed, and business carried on, with a view to the good order and benefit of the community, even although they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced. Bancroft v. Cambridge, 126 Mass. 438, 441. In most instances, the illustrations of the proper exercise of this power are found in rules and regulations restraining the use of property by the owner, in such a manner as would cause disturbance and injury to others. But the privilege of continuing in the passive enjoyment of one's own property, in the same manner as formerly, is subject to a like limitation; and with the increase of population in a neighborhood, and the advance and development of business, the quiet and seclusion and customary enjoyment of homes are necessarily interfered with, until it becomes a question how the right which each person has of prosecuting his lawful business in a reasonable and proper manner shall be made consistent with the other right which each person has to be free from unreasonable

disturbance in the enjoyment of his property. Merrifield v. Worcester, 110 Mass. 216, 219. In this conflict of rights, police regulations by the Legislature find a proper office in determining how far and under what circumstances the individual must yield with a view to the general good. For example, if, in a neighborhood thickly occupied by dwelling-houses, any one, for his own entertainment or the gratification of a whim, were to cause bells to be rung and steam-whistles to be blown to the extent that is usual with the bells and steam-whistles of locomotive engines near railroad stations in large cities, there can be no doubt that it would be an infringement of the rights of the residents, for which they could find ample remedy and vindication in the courts. But if the Legislature, with a view to the safety of life, provides that bells shall be rung and whistles sounded, under those circumstances, persons living near by must necessarily submit to some annoyance from this source, which otherwise they would have a right to be relieved from.

It is ordinarily a proper subject for legislative discretion to determine by general rules the extent to which those who are engaged in customary and lawful and necessary occupations shall be required or allowed to give signals or warnings by bells or whistles, or otherwise, with a view either to the public safety, as in the case of railroads, or to the necessary or convenient operation and management of their own works; and ordinarily such determination is binding upon the courts, as well as upon citizens generally. And when the Legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the Legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law. Bancroft v. Cambridge, 126 Mass. 441. It is accordingly held in many cases, and is now a well-established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of property situated near a railroad, caused by the necessary noise, vibration, dust, and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the Legislature, must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form. The legislative sanction makes the business lawful, and defines what must be accepted as a reasonable use of property and exercise

of rights on the part of the railroad company, subject always to the qualification that the business must be carried on without negligence or unnecessary disturbance of the rights of others. And the same rule extends to other causes of annoyance which are regulated and sanctioned by law. . . .

Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good. Grave ones will fall within the constitutional limitation that the Legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. The difficulty of marking the boundaries of this legislative power, or of prescribing limits to its exercise, was declared in Commonwealth v. Alger, 7 Cush. 53, 85, and is universally recognized. Courts, however, must determine the rights of parties in particular cases as they arise; always recognizing that the ownership of property does not of itself imply the right to use or enjoy it in every possible manner, without regard to corresponding rights of others as to the use and enjoyment of their property; and also that the rules of the common law, which have from time to time been established, declaring or limiting such rights of use and enjoyment, may themselves be changed as occasion may require. Munn v. Illinois, 94 U. S. 113, 134.

In the case before us, looking at it for the present without regard to the decree of this court in the former case between these parties, we find nothing in the facts set forth which show that the statute relied on as authorizing the plaintiffs to ring their bell (St. 1883, c. 84) should be declared unconstitutional. It is virtually a license to manufacturers, and others employing workmen, to carry on their business in a method deemed by the Legislature to be convenient, if not necessary, for the purpose of giving notice, by ringing bells, and using whistles and gongs, in such manner and at such times as may be designated in writing by municipal officers. In character, it is not unlike numerous other instances to be found in our statutes, where the Legislature has itself fixed, or has authorized municipal or other boards or officers to fix, the places, times, and methods in which occupations may be carried on, or acts done, which would naturally be attended with annoyance to individuals. The example of bells and whistles on locomotive engines has already been mentioned. Reference

may also be made to the statutes regulating the use of stationery steam engines, the places and manner of manufacturing or keeping petroleum, of carring on other offensive trades and occupations, of storing gunpowder, and of establishing hospitals, stables, and bowling alleys. . . .

It is then argued that the Legislature cannot legalize a nuisance, and cannot take away the rights of the defendants as they have been ascertained and declared by this court; and this is undoubtedly true, so far as such rights have become vested. For example, if the plaintiff under an existing rule of law has a right of action to recover damages, for a past injury suffered by him, his remedy cannot be cut off by an act of the Legislature. So, also, if, in a suit in equity to restrain the continuance of a nuisance, damages have been awarded to him, or costs of suit, he would have an undoubted right to recover them, notwithstanding the statute. But on the other hand, the Legislature may define what in the future shall constitute a nuisance, such as will entitle a person injured thereby to a legal or equitable remedy, and may change the existing common-law rule upon the subject. It may declare, for the future, in what manner a man may use his property or carry on a lawful business without being liable to an action in consequence thereof; that is, it may define what shall be a lawful and reasonable mode of conduct. This legislative power is not wholly beyond the control of the courts, because it is restrained by the constitutional provision limiting it to wholesome and reasonable laws, of which the court is the final judge, but, within this limitation, the exercise of the police power of the Legislature will apply to all within the scope of its terms and spirit. The fact that the rights of citizens, as previously existing, are changed, is a result which always happens; it is indeed in order to change those rights that the police power is exercised. So far as regards the rights of parties accruing after the date of the statute, they are to be governed by the statute; their rights existing prior to that date are not affected by it. To illustrate this view, let it be supposed that the case between the present parties in its original stage had been determined in favor of the manufacturers, under which decision they would have had a right to ring their bell; and that afterwards a statute had been passed providing that manufacturers should not ring bells except at such hours as might be approved by the selectmen; and that these manu-

facturers had then proceeded to ring their bell at other hours, not included in such approval. It certainly could not be said that they had a vested right to do so, under the decision of the court.

The injunction which was awarded by the court, upon the facts which appeared at the hearing, did not imply a vested right in the present defendants to have it continued permanently. Though a final determination of the case before the court, and though binding and imperative upon the present plaintiffs and enforceable against them by all the powers vested in a court of equity, yet they were at liberty at any time, under new circumstances making it inequitable for it to be longer continued, to apply to the court for a review of the case and a dissolution of the injunction. In respect to such a state of facts, an injunction can never be said to be final, in the sense that it is absolute for all time. Even without any new legislation affecting the rights of the parties, with an increase of their own business and a general increase of manufacturing and other business in the vicinity, and of a general and pervading change in the character of the neighborhood, it might be very unreasonable to continue an injunction which it was in the first instance entirely reasonably and proper to grant. The ears of the court could not under such new circumstances be absolutely shut to an application for its modification, without any new statute declaring the policy of the Commonwealth in respect to any branch of business or employment. But a declaration by the Legislature that, in its judgment, it is reasonable and necessary for certain branches of business to be carried on in particular ways, notwithstanding the incidental disturbance and annoyance to citizens, is certainly a change of circumstances which is entitled to the highest consideration of the court; and in the present case we cannot doubt that it is sufficient to entitle the plaintiffs to relief from the operation of the injunction. . . .

Demurrer overruled.

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## ELLIS v. KANSAS CITY, ETC., R. R. CO.

(Supreme Court of Missouri, 1876, 63 Mo. 131.)

NORTON, J. This was an action brought by plaintiff in the special law and equity court of Jackson county, to recover damages for a

nuisance. It is alleged in the petition that the plaintiff and her husband and their children were living in a certain house in Platte county of which her husband had the possession, situated about forty yards from the railroad track of defendant; that during their occupancy of said house the defendant, by their locomotive, ran against and killed a horse, directly opposite the house occupied by plaintiff, and permitted the same to remain on the side of their railroad track for about two weeks, during which time, by the decomposition of the carcass, the surrounding atmosphere became so noxious and offensive as to render the house occupied by the plaintiff unwholesome, and caused her to become seriously sick. The answer denies all the material allegations of the petition. . . .

The defendant, in permitting the horse killed by its locomotive to remain on the side of the track, so near the house occupied by plaintiff and her husband as to render its occupancy unwholesome, was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house. The right of action in this case was in the husband of plaintiff, he being the occupier and in the rightful possession of the house with his family by contract with the owner of the property. Had the husband brought this suit it could have been maintained, and on the trial he would have been permitted not only to show the sickness of himself, but also the sickness of his wife, his family, and the different members thereof. as a measure for the recovery of damages. (Story v. Hammond, 4 Ohio, 376; Kearney v. Farrell, 28 Conn. 317.) . . .

We have not been able to find any authority which would authorize us to declare that each member of the family of the occupant of a house affected by a private nuisance could maintain an action therefor, which would follow if the views contended for by plaintiff are correct. In an action to recover damages for a nuisance of the character complained of, the plaintiff must prove possession of the house, the injurious act complained of, and the damages resulting therefrom. (2 Greenl. Ev. § 470.) . . .

## KUZNIAK v. KOZMINSKI.

(Supreme Court of Michigan, 1895, 107 Mich. 444, 65 N. W. 275).

LONG, J. The parties to this cause own adjoining lots in the city of Grand Rapids. Defendants' lot is on the southeasterly corner of Eleventh and Muskegon streets, and upon which is a large tenement house facing both streets. The complainant owns the lot immediately south and adjoining the defendants', and upon which he has a dwelling house facing Muskegon street, and also a tenement house about 60 feet back from Muskegon street, and within 22 inches of the north line, being the line of defendant's lot. At the time this tenement house was erected, defendants had upon their lot what was called a "chicken shed;" and, after complainant's tenement house was erected, defendants moved this chicken shed upon a part of their lot directly opposite complainant's tenement house, and within 24 inches of the lot line, and converted it into a coal and wood house for the use of their tenants, who occupied the dwelling on said lot. This bill was filed by complainant for the purpose of having this coal and wood house of defendants declared a nuisance, and to compel them to remove the same. The claim made by the bill is that the defendants removed the building to that place through spite and from a malicious motive, and not because it was needed for any useful purpose. Defendants answered the bill, denying that they were actuated by malice in putting the building there, and averred that it was so placed for the use of their tenants for wood and coal. The testimony was taken in open court, and the court found that the building was a nuisance, and a decree was entered directing the defendants to remove the building within 60 days from the date of the decree, and that, in default of such removal, the sheriff of the county remove the same, at the cost and expense of defendants. The complainant was awarded the costs of the suit. Defendants appeal.

It was held in Flaherty v. Moran, 81 Mich. 52, that a fence erected maliciously, and with no other purpose than to shut out the light and air from a neighbor's window, was a nuisance, and the decree of the court below ordering its removal was affirmed; but that decision was placed on the ground that the fence served no useful purpose, and was erected solely from a malicious motive. In the present case the

building erected by the defendants was for a useful purpose; and, while there may have been some malice displayed in putting it so near complainant's house as to shut off some of the light, that would not be a sufficient reason upon which to found a right in complainant to have the building removed. Defendants had a right to erect a building upon their own premises, and the decisions have been quite uniform to the effect that the motives of a party in doing a legal act cannot form the basis upon which to found a remedy. In Allen v. Kinyon, 41 Mich. 282, it was held that the motive is of no consequence when the party does not violate the rights of another. In Hawkins v. Sanders, 45 Mich. 491, it was held that there was no right of prospect which would prevent the erection of an awning on a neighboring lot. The case does not fall within the rule of Flaherty v. Moran, *supra,* and the court below was in error in directing the removal of the building. That decree must be reversed, and a decree entered here dismissing complainant's bill, with costs of both courts to the defendants.

The other Justices concurred.

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## WARREN v. PARKHURST.

(New York Court of Appeals, 1906, 186 N. Y. 45, 78 N. E. 579.)

BARTLETT, J. This action is brought against forty defendants in the city of Gloversville. . . .

The plaintiff, for the last ten years, has owned, and now owns, a lot of land and dwelling house on this canal, occupied for residential purposes and the maintenance of a meat market. The defendants for the last six years have discharged, and do now discharge, each from his own place of business into Cayadutta creek, large quantities of filthy matter and tannery and factory refuse and harmful and polluting substances, solid and liquid, thereby polluting the waters and bed and banks of the creek, rendering them offensive to the senses and occasioning deposit in the canal and upon the lands of the plaintiff thereon, rendering them less useful for domestic purposes. By reason of this pollution of the canal disagreeable and noxious odors have arisen, continually pervading the plaintiff's dwelling house and

meat market, destroying the comfort of the plaintiff and his tenants in the use of his property and diminishing the value thereof and rendering the premises unhealthful. Each defendant maintains permanent drains and sluices for carrying such refuse and polluting and harmful substances into Cayadutta creek and intends to continue such discharge thereof and to increase the same unless restrained from so doing. "The damages suffered by the plaintiff from the pollution of the stream by any one defendant, if there were not other sources of pollution, would be nominal; but from the concurring and continuous trespass of all the defendants, the injury which the plaintiff and his lands sustain is great and if the said nuisance is continued will be irreparable and the said lands and tenements will be rendered wholly worthless for domestic or for other purposes." . . .

The principles of equity jurisprudence applicable to the determination of this appeal have never been more clearly stated by any tribunal in the United States or more thoroughly or ably discussed than in the opinion of the Supreme Judicial Court of Maine in the case of Lockwood Co. v. Lawrence (77 Me. 297). The nuisance which was the subject of complaint in that case arose out of the deposit in a river of the waste from sawmills by several owners and proprietors of such sawmills acting independently of one another. The refuse material and debris arising from the operation of their separate sawmills was carried down the river and commingled into one indistinguishable mass before it reached the premises of the complainant, where it was deposited in such quantities as to constitute a nuisance. Objection was made to the joinder of the several defendants in one bill on the ground that the cause of action was distinct and several as against each of them, it being expressly alleged in the bill that each was independently working his own saw mill without any conspiracy or preconcert of understanding or action with the others. This objection was held to be untenable, inasmuch as there was cooperation in fact in the production of the nuisance. "The acts of the respondents," said Foster, J, "may be independent and several, but the result of these several acts combine to produce whatever damage or injury these complainants suffer, and in equity constitutes but one cause of action."

Another leading case in which the same rule was applied is Draper v. Brown (115 Wis. 361), which was a suit in equity against a

number of defendants to restrain the commission of acts resulting in a nuisance and consequent injury of the property of the plaintiff. The gravamen of the action was the unlawful lowering of the waters of a lake below their accustomed level, the plaintiff alleging that some of the defendants who owned a mill dam at the outlet of the lake drew an excessive quantity of water therefrom; that other defendants withheld the natural flow of a river running into the lake, and that still another obstructed the flow of the river, thereby diminishing the quantity of the water which reached the lake. It was contended that two or more causes of action were improperly united in the complaint, but the court held that the complaint stated but one cause of action in which all the defendants were interested inasmuch as though all the defendants acted independently and without concert their acts united and concurred in producing the injurious result. The fact that the parties were acting without concert was declared to be no defense to an equitable action for injunctive relief if their acts contributed in some appreciable degree to produce the conditions sought to be repressed. . . .

In the decisions of the English courts we also find precedents for the maintenance of such a suit in equity as that before us. In Thorpe v. Brumfitt (L. R. (8 Ch. App.) 650) Thorpe, the lessee of an inn, brought an action against Morrell, Brumfitt and other tenants of Morrell for an injunction to restrain the defendants from blocking up or obstructing a right of way leading to the inn. The obstruction complained of was caused by allowing carts and wagons to remain stationary in the passage in course of loading and unloading so as to obstruct access to the yard of the inn. The master of the rolls made a decree declaring that the plaintiffs and the defendants had an equal and reciprocal right to the use of the roadway, but that none of the persons interested were entitled to place or to leave any stationary obstruction in such roadway except at such times as the use thereof was not required for any of the other persons interested therein, and he granted an injunction in accordance with this declaration. The decree and injunction were affirmed in the Court of Appeal and Lord Justice James in his opinion sustained the proposition that the acts of several persons may constitute a nuisance which the court will restrain when the damage occasioned by the acts of any one if taken alone would be inappreciable. He said: "Then it was said that the plaintiff alleges an obstruction caused by several persons

acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way; that may cause a serious inconvenience which a person entitled to the use of the way has a right to prevent, and it is no defense to any one person among the hundred to say that what he does causes of itself no damage to the complainant." . . .

Judgment affirmed.

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## SOLTAU v. DE HELD.

(In Chancery, 1851, 2 Sim. (N. S.) 133.)

Previously to 1817, a mansion-house in Park Road, Clapham, was divided into two messuages, but without there being any party-wall between them; and, on the 25th of March 1817, the plaintiff took a lease of one of the messuages for sixty-nine years: and, with the exception of two intervals, he had ever since resided in it with his family. The other messuage was occupied as a private residence up to July, 1848, when it was purchased by a religious order of Roman Catholics, called "The Redemptorist Fathers;" and they converted the ground floor into a chapel, and appointed the defendant, who was a priest of the Roman Catholic church, to officiate in it. In August, 1848, the defendant caused a wooden frame to be erected on the roof of the last-mentioned messuage, and a bell to be hung in it, which was rung, by his direction, five times on Monday, Tuesday, Wednesday, Thursday and Friday; six times on Saturday, and oftener on Sunday in every week: the ringing ordinarily commenced at five in the morning, and continued for ten minutes, to the great discomfort and annoyance of the plaintiff and his family. . . .

In May, 1851, a Roman Catholic church with a steeple, was erected on the ground adjoining the chapel, and was opened on the 14th of that month, and, on that occasion, six bells, which had been placed in the belfry of the steeple, were rung nearly the whole day. . . .

The chapel bell and church bells were, subsequently to 20th of May, rung daily, upon an average, as great a number of times as they had been rung upon the several occasions before mentioned, down to the time when the plaintiff obtained a verdict in the action after mentioned.

The bill was filed on the 20th of November, 1851, and, after stating as above, it alleged that, when a peal of the church bells was rung, the noise was so great that it was impossible for the plaintiff, or the members of his family, to read, write or converse in his house: that the ringing of the chapel bell and church bells was an intolerable nuisance to the plaintiff, and if the said bell or bells was or were permitted to be rung in the manner in which the same were so rung as aforesaid, it would be impossible for the plaintiff to reside any longer in his house: that in consequence of the before-mentioned grievance, the plaintiff applied to the defendant to desist from ringing the said bells or any of them, so as to occasion any annoyance to the plaintiff; and the defendant, having refused to comply with that application, the plaintiff, in June, 1851, commenced an action against the defendant to recover damages for the nuisance committed to him, by means or in consequence of the before-mentioned ringing of the said bell or bells: that the action was tried on the 13th of August, 1851, when a verdict was found for the plaintiff, with forty shillings damages and costs: that, on the 10th of November, 1851, judgment in the action was signed, and it remained unreversed.

The bill further alleged, that some time after the commencement of the said action, the chapel bell was removed from the roof to one of the sides of the chapel, and after the 13th of August, neither that bell nor the church bells were rung until Sunday the 9th of November, 1851. . . .

The bill prayed that the defendant and all persons acting under his directions, or by his authority, might be restrained from tolling or ringing the chapel bell and the church bells, or any of such bells, and from permitting the said bell and bells, or any of them, to be tolled or rung: or that the defendant and such persons as aforesaid, might in like manner, be restrained from tolling or ringing the said bell or bells, permitting the same or any of them to be tolled or rung, so as to cause or occasion any nuisance or annoyance to the plaintiff or any of the members of his family residing at his residence in Park Road, Clapham. . . .

THE VICE-CHANCELLOR: . . . The next ground insisted upon in support of the demurrer, was that the plaintiff had not established his right at law. Now, it is true that equity will only interfere in case of nuisance, where the thing complained of is a nuisance at law: there is no such thing as an equitable nuisance: but it is no ground of demurrer that the matter has not been tried at law. It very often is a ground for refusing an injunction: but it is not ground of demurrer, as appears from Berkley v. Ryder, 2 Vesey, sen. P. 533, and from Lord Cottenham's Judgment in Elmshirst v. Spencer, where his Lordship expresses himself thus: "The plaintiff, before he can ask for the injunction, must prove that he has sustained such a substantial injury, by the acts of the defendant as would have entitled him to a verdict at law, in an action for damages." And then, in another part of the same judgment, he says: "This court will not take upon itself to adjudicate upon the question whether this is a nuisance or not: that must be ascertained in a court of law, as laid down by Lord Eldon in The Attorney-General v. Cleaver." Now, in The Attorney-General v. Cleaver, which was a case of public nuisance, Lord Eldon directed the indictment, which had been already brought and was pending, to be prosecuted, and ordered the motion to stand over until the hearing of it. Therefore Lord Cottenham, in that case, is referring to this; that you cannot ask for the injunction if there be a question about its being a nuisance at law. But I do not know where it is laid down that a bill will not lie, that is, that it is a ground of demurrer because the action has not yet been brought. However, whether that be so or not, the plaintiff in this case has brought his action at law, and obtained a verdict.

Then this ingenious argument was adduced. It was said: "There has been an action at law; but what is now being done, and which you call a nuisance, has never been tried at law. When the trial took place we were ringing every day in the week: we were beginning at five o'clock in the morning, and we were ringing a considerable period of time on each occasion: but now we ring only on Sundays. We ring a fewer number of times, and do not ring so long at a time. Therefore, you must bring your action for this, and try whether this is a nuisance." If that argument were to prevail, see what it would come to. Supposing that, after the trial of the action, the defendant, instead of ringing seven days in the week, had rung six; or, instead of beginning at five o'clock in the morning, had begun

at six; or, instead of ringing for a quarter of an hour, had rung ten minutes each time; and when the plaintiff came into equity to restrain him, he had said: "You have not tried this. When you brought your action, I rang seven days in the week; I ring only six now. I began at five o'clock; I now begin at six in the morning." If that were yielded to, and another action brought and damages recovered, the defendant would reduce the number of days' ringing from six to five, and say you have not tried this; and so on *toties quoties*. It is clear the argument, if pushed to its full extent, must result in that which is contrary to all reason and to all justice. The questions to be tried were, whether the plaintiff's right in his house was such as to entitle him to come for relief at all, and whether the ringing of the bells was in its nature, a nuisance at law. Both these questions have been tried; but the exact extent or *quantum* of injury or nuisance inflicted, need not be ascertained. Besides, the whole argument upon this ground is put an end to by an allegation in the bill, which the demurrer of course, admits to be true; "that the defendant threatens and intends, not only to continue tolling or ringing the last-mentioned bells every Sunday in the manner last aforesaid, but he also threatens and intends to ring peals of the said six bells, and also to toll and ring, on week days; and he also threatens and intends to toll and ring the bell of the before-mentioned chapel or religious house." Therefore, upon this demurrer, it is quite clear that the argument that the plaintiff has not established his right, at law, cannot be maintained.

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## NELSON v. MILLIGAN.

(Supreme Court of Illinois, 1894, 151 Ill. 462, 38 N. E. 239.)

WILKIN, C. J. This was a bill, by appellant against appellees in the Superior Court of Cook county, filed on the 31st of December, 1892, for injunction. . . .

The injury complained of by the bill, sought to be enjoined, is permitting dense smoke, dust and soot to be emitted from the chimneys of defendants' hotel, which is cast upon and into the doors and windows of complainant's dwelling house, to the injury of his carpets,

curtains, draperies, etc., and to the annoyance and discomfort of himself and family residing therein. . . .

While the decree finds that complainant was injured by smoke from the chimneys of the defendants, as alleged in the bill, it also finds that the hotel building can be operated without causing any dense smoke, by the use of proper fuel; that on certain occasions the manager caused certain kinds of fuel to be used, which produced no dense smoke or soot in appreciable quantities, but that, during the months of November and December, 1892, dense smoke frequently issued from the chimneys of said hotel building.

All, then, that can be said from the bill, answer, and findings of the decree, is that, from time to time, prior to the filing of the bill, through the negligence or wrongful act of the defendants, complainant was injured in the manner stated in his bill. The decree in effect finds that, while using "West Virginia coal," no appreciable dense smoke was emitted, and there is no conflict in the evidence as to the fact that defendants proposed using that quality of fuel, and had done so when it could be obtained.

While it is true that the consequences of their not being able to get, or unwillingness to use, the better and higher priced quality of coal, can not be visited upon complainant without compensation in damages, it by no means follows that a court of equity will make them liable to its penalties for contempt, if they should be compelled to use the inferior fuel temporarily to avoid abandoning their business. The remedy for such an injury is complete and adequate at law. There is no theory of this case, conceding all that is found in the decree, upon which it can be said an injury is shown which can not be fully ascertained and adequately compensated by damages in an action at law, or which, from its continuance or permanent mischief, will necessarily occasion constantly recurring grievances, which can not be otherwise prevented than by injunction, and therefore, upon the authorities cited above, no ground is shown for the exercise of equity jurisdiction. . . .

The evidence, then, in this record, favorably construed for the complainant, shows no more than that the defendants, in carrying on their lawful business, have temporarily been compelled to use, or have at most negligently used, a quality of fuel which produced dense smoke, to the injury of complainant. As before said, for such

an injury the remedy at law is complete and adequate. There is nothing in this record to justify the conclusion that there will be occasion to resort to such an action repeatedly. There is, therefore, no occasion for invoking the jurisdiction of a court of equity. This conclusion in no way conflicts with the view, that emitting dense smoke from chimneys may become both a public and private nuisance, nor that cases may not arise where such nuisances will be enjoined. No such case is presented by this record.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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## WHALEN v. UNION BAG & PAPER CO.

(New York Court of Appeals, 1913, 208 N. Y. 1, 101 N. E. 805.)

WERNER, J. The plaintiff is a lower riparian owner upon Kayaderosseras creek in Saratoga county, and the defendant owns and operates on this stream a pulp mill a few miles above plaintiff's land. This mill represents an investment of more than a million dollars and gives employment to 400 or 500 operatives. It discharges into the waters of the creek large quantities of a liquid effluent containing sulphurous acid, lime sulphur, and waste material consisting of pulp wood, sawdust, slivers, knots, gums, resins and fibre. The pollution thus created, together with the discharge from other industries located along the stream and its principal tributary, has greatly diminished the purity of the water.

The plaintiff brought this action to restrain the defendant from continuing to pollute the stream. The trial court granted an injunction to take effect one year after the final affirmance of its decision upon appeal, and awarded damages at the rate of $312 a year. The Appellate Division reversed the judgment of the Special Term upon the law and facts, unless the plaintiff should consent to a reduction of damages to the sum of $100 a year, in which event the judgment as modified should be affirmed, and eliminated that part of the trial court's decree granting an injunction. The plaintiff thereupon stipulated for a reduction of damages, and then appealed to this court from the modified judgment. The facts found by the trial

court—which do not appear to have been disturbed by the Appellate Division—establish a clear case of wrongful pollution of the stream, and need not be set forth in detail.

The plaintiff is the owner of a farm of two hundred and fifty-five acres, and the trial court has found that its use and value have been injuriously affected by the pollution of the stream caused by the defendant. The defendant conducts a business in which it has invested a large sum of money and employs great numbers of the inhabitants of the locality. We have recently gone over the law applicable to cases of this character (Strobel v. Kerr Salt Co., 164 N. Y. 303; Sammons v. City of Gloversville, 175 id. 346,) and it is unnecessary now to restate it. The majority of the learned court below reduced the damages suffered by the plaintiff to $100 a year, and reversed that portion of the decree of the trial court which awarded an injunction. The setting aside of the injunction was apparently induced by a consideration of the great loss likely to be inflicted on the defendant by the granting of the injunction as compared with the small injury done to the plaintiff's land by that portion of the pollution which was regarded as attributable to the defendant. Such a balancing of injuries cannot be justified by the circumstances of this case. It is not safe to attempt to lay down any hard and fast rule for the guidance of courts of equity in determining when an injunction shall issue. As Judge Story said: "It is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrong." (2 Story's Eq. Juris. [10 ed.] § 959b).

One of the troublesome phases of this kind of litigation is the difficulty of deciding when an injunction shall issue in a case where the evidence clearly establishes an unlawful invasion of a plaintiff's rights, but his actual injury from the continuance of the alleged wrong will be small as compared with the great loss which will be caused by the issuance of the injunction. This appeal has been presented as though that question were involved in the case at bar, but we take a different view. Even as reduced at the appellate division, the damages to the plaintiff's farm amount to $100 a year. It can hardly be said that this injury is unsubstantial, even if we should leave out of consideration the peculiarly noxious character of the pollution of which the plaintiff complains. The waste from the defendant's mill is very destructive both to vegetable and animal life and tends to deprive the

waters with which it is mixed of their purifying qualities. It should be borne in mind also that there is no claim on the part of the defendant that the nuisance may become less injurious in the future. Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich. It is always to be remembered in such cases that "denying the injunction puts the hardship on the party in whose favor the legal right exists instead of the wrongdoer." (Pomeroy's Eq. Juris. vol. 5, § 530.) In speaking of the injustice which sometimes results from the balancing of injuries between parties, the learned author from whom we have just quoted, sums up the discussion by saying: "The weight of authority is against allowing a balancing of injury as a means of determining the propriety of issuing an injunction." To the same effect is the decision in Weston Paper Co. v. Pope (155 Ind. 394.) "The fact that the appellant has expended a large sum of money in the construction of its plant and that it conducts business in a careful manner and without malice can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for the free use of their land; and they were bound also to know the character of their proposed business, and to take notice of the size, course, and capacity of the stream, and to determine for themselves at their own peril whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury to their neighbors; and the magnitude of their investment and the freedom from malice furnish no reason why they should escape the consequences of their own folly." . . .

## BLISS v. ANACONDA COPPER MINING CO.

(United States Circuit Court, 1909, 167 Fed. 342.)

Hunt, P. J. Fred J. Bliss, a resident and citizen of Idaho, instituted this suit on the 4th day of May, 1905, against the Anaconda Copper Mining Company and the Washoe Copper Company, Montana corporations, and prayed for a permanent injunction forever restraining and enjoining defendants from operating a certain smelting plant situated near the city of Anaconda, Mont., and from treating ores described as containing poisonous and deleterious substances, and for general relief. . . .

Finally, in the last analysis, when, in connection with the attitude of Mr. Bliss, direct and vicarious, we weigh the uncertainty of his proof as to the amount of past damages done to his land, or of future damages to be done to his pastures by the acts of these defendants, together with the fact that he has not resorted to a court of law to recover any damages at all, and balance these matters against the stern fact that, if defendants are enjoined as prayed for, they must either buy the lands of the farmers at their own prices, or sacrifice their property; that, if enjoined as prayed for, their smelter must close; that, if it does close, their business and great property will be practically ruined; that a major part of the sulphide copper ores of Butte cannot be treated elsewhere within this state; that thousands of defendants' employees will have to be discharged; that the cities of Anaconda and Butte will be injured irreparably by the general effect upon internal commerce and business of all kinds; that professional men, banks, business men, working people, hotels, stores, and railroads will be so vitally affected as to cause unprecedented depression in the most populous part of the state; that the county government of one county of the state may not be able to exist; that the farmers of the valleys adjacent to Butte and Anaconda will not have nearly as good markets as they have enjoyed; that the industry of smelting copper sulphide ores will be driven from the state; and that values of many kinds of property will either be practically destroyed or seriously affected—remembering, always, that the courts of law are open to Mr. Bliss, I hold that under the evidence, as he has submitted

his case, discretion, wisely, imperatively guided by the spirit of justice, does not demand that injunction, as prayed for, should issue.

It does not necessarily follow, however, that his bill should be dismissed. This has been a litigation of overmuch expense. Its consequences are of interest to many people, and, keeping in mind the essential fact that animal health is being affected, if there can be any reasonable preventive remedy applied by a court of equity, every larger consideration demands that it should be; that is to say, notwithstanding the denial of the writ, as prayed for, if a measure of relief less than that which complainant has proved he is entitled to can be awarded to him, he should have it by some form of judicial order. Equity, having jurisdiction of the parties and the subject-matter, will therefore retain the bill, in diligent effort to afford all the relief reasonably possible under its allegations. Where the defendant has a clear ultimate right to do the act sought to be enjoined upon certain possible conditions, the courts will endeavor to adjust their orders so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining the defendant from the exercise of its ultimate rights. McElroy v. Kansas City, (C. C.) 21 Fed. 257.

I am always deeply sensible, too, how especially important it is, in the practical preservation of the equality of the law, that, when a man of limited means seeks relief against a corporation or individual of very great wealth, his property rights must be protected with scrupulous care against threatened or continuing unlawful encroachments, without unnecessarily forcing him into litigation so expensive or protracted that it may mean impoverishment or denial of substantial justice. Let it not be understood that, in saying this, I mean to imply that defendants herein have assumed any unfair attitude toward Mr. Bliss or others in the Deer Lodge valley. On the contrary, as the case is submitted, it appears that they were ready to treat with him and other landowners, and were willing to buy his land, and consider claims of injury; but their advances were checked by Mr. Bliss' refusal to sell, and by the ultimatum of March 4, 1905, from the association. Nevertheless, the court will not peremptorily turn the complainant away, but will use its power, already invoked in this suit, to give him relief as may be reasonably possible, without destroying defendants' business; but, for lack of information, the court can now make no such specific order as will be just to both

sides. Accordingly, after a study of the evidence of Mr. Mathewson, superintendent of the Washoe smelter, I take it upon myself as a chancellor to say that I am not satisfied that the construction of additional arsenic furnaces will not help the situation, or that there may not be some system of spraying the smoke and cooling the gases which will aid in settling flue dust, or that a greater width and height to the chambers may not be effective aids, or that a further system of filters may not be devised, or that briquetting flue dust may not be of help, or that an arrangement of bags may not be made, or other means applied, perhaps discovered since this suit was instituted, which will materially reduce the quantities of escaping arsenic. I therefore think the more equitable course to pursue is to call for further evidence with respect to the subject of adopting other or additional means to prevent the release of arsenic, to the end that I may be more fully advised in the premises before making final disposition of the case. . . .

## SECTION IV. DISTURBANCE OF PRIVATE EASEMENTS.

### PARKER & EDGARTON v. FOOTE.

(Supreme Court of New York, 1838, 19 Wend. 309.)

This was an action on the case for stopping lights in a dwelling-house, tried at the Oneida circuit in April, 1836, before the Hon. Hiram Denio, then one of the circuit judges. . . .

Most of the cases on the subject we have been considering, relate to ways, commons, markets, water-courses, and the like, where the user or enjoyment, if not rightful, has been an immediate and continuing injury to the person against whom the presumption is made. His property has either been invaded, or his beneficial interest in it has been rendered less valuable. The injury has been of such a character that he might have immediate redress by action. But in the case of windows overlooking the land of another, the injury, if any, is merely ideal or imaginary. The light and air which they admit

are not the subjects of property beyond the moment of actual occupancy; and for overlooking one's privacy no action can be maintained. The party has no remedy but to build on the adjoining land opposite the offensive window. (Chandler v. Thompson, 3 Campb. 80. Cross v. Lewis, 2 Barn. & Cress, 686, per Bayley, J.) Upon what principle the courts in England have applied the same rule of presumption to two classes of cases so essentially different in character, I have been unable to discover. If one commit a daily trespass on the land of another under a claim of right to pass over, or to feed his cattle upon it; or divert the water from his mill, or throw it back upon his land or machinery; in these and the like cases, long continued acquiescence affords strong presumptive evidence of right. But in the case of lights, there is no adverse user, nor indeed any use whatever of another's property; and no foundation is laid for indulging any presumption against the rightful owner. . . .

The learned judges who have laid down this doctrine have not told us upon what principle or analogy in the law it can be maintained. They tell us that a man may build at the extremity of his own land, and that he may lawfully have windows looking out upon the lands of his neighbor. (2 Barn. & Cres. 686; 3 id. 332.) The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and indeed, so it is adjudged, as we have already seen; and yet somehow or other, by the exercise of a lawful right in his own land for 20 years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seized of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which city and village lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. (2 Barn. & Cres. 686. 2 Carr. & Payne, 465; 5 id. 438.) Now what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor. How then has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall 20 or 50 feet high, as the case may be—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although done in one's own land, is cal-

culated to render a man odious. Indeed an attempt has been made to sustain an action for erecting such a wall. (Mahan v. Brown, 13 Wendell, 261).

There is, I think, no principle upon which the modern English doctrine on the subject of lights can be supported. It is an anomaly in the law. It may do well enough in England; and I see that it has recently been sanctioned with some qualification by an act of parliament. (Stat. 2 & 3 Will. 4, c. 71, § 3.) But it cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences. It has never, I think, been deemed a part of our law. (3 Kent's Comm. 446, note [a].) Nor do I find that it has been adopted in any of the states. The case of Story v. Odin (12 Mass. R. 157), proceeds on an entirely different principle. It cannot be necessary to cite cases to prove that those portions of the common law of England which are hostile to the spirit of our institutions, or which are not adapted to the existing state of things in this country, from no part of our law. And besides, it would be difficult to prove that the rule in question was known to the common law previous to the 19th of April, 1775 (Const. N. Y. art. 7, § 13.) There were two *nisi prius* decisions at an earlier day (Lewis v. Price in 1761, and Dongal v. Wilson in 1763), but the doctrine was not sanctioned in Westminster Hall until 1786, when the case of Darwin v. Upton was decided by the K. B. (2 Saund. 175, note [2]). This was clearly a departure from the old law. (Bury v. Pope, Cro. Eliz. 118).

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## BRANDE v. GRACE.

(Supreme Court of Massachusetts, 1891, 154 Mass. 210, 31 N. E. 633.)

Bill in equity, filed in the Superior Court on August 30, 1890, against James J. Grace and the American Protective League, to prevent the defendants from altering a building. The case was heard by MASON, J., and reported for the determination of this court, and was as follows.

The plaintiffs composed the firm of Brande and Soule, dentists; and the defendant Grace was the lessee of premises numbered 181 Tremont Street, in Boston, which included a six-story building set

back from twelve to fourteen feet from the sidewalk of that street. The unoccupied land between the building and the street was included in his lease, and was used as a part of the sidewalk, but had never been dedicated to the public. On or about February 1, 1888, Grace executed a sublease, with a covenant therein for quiet enjoyment of a portion of the building, described as "the rooms numbered, 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with all the rights and privileges thereto belonging. . . . from the first day of March, A. D. 1888, during the following term of four years thence next ensuing, expiring February 29, A. D. 1892." These rooms included the front rooms on that story, and from them an uninterrupted outlook was to be had into the street. The plaintiffs, who were already in occupation of the rooms as tenants of Grace, continued thenceforward to occupy the rooms, and to do a profitable business in dentistry there, and allowed their signs attached to the outside face of the front wall to remain there. Subsequently Grace sublet the entire premises to the American Protective League for a term of years, which corporation proceeded to alter the building by taking down the original front wall thereof, and by extending its side walls to the street line and erecting a new front wall to the entire height of the building, so as to enclose the rooms leased and occupied by the plaintiffs, and to interpose another room between them and the street. This bill was then brought by the plaintiffs to prevent such alterations from being made, and a temporary injunction was issued to prevent the defendants from taking down so much of the original front wall as enclosed the second story of the building. . . .

Allen, J. The determination of this case depends upon the proper application of rules of law, which of themselves are simple. "The grant of anything carries an implication, that the grantee shall have all that is necessary to the enjoyment of the grant, so far as the grantor has power to give it." Salisbury v. Andrews, 19 Pick. 250, 255. And in order to determine what is thus granted by implication, the existing circumstances, and the actual condition and situation of that which is granted, may be looked at. Salisbury v. Andrews, 19 Pick. 250, 255.

The premises leased to the plaintiffs were described as "the rooms numbered 1, 2, 3, and 4, located on the second floor of building numbered 181, and located on Tremont Street in said Boston, with

all the rights and privileges thereto belonging." These rooms included all the front rooms in the second story of the building. The building was set back twelve or fourteen feet from the line of the street, and the space between the building and the line of the street had been used as a part of the sidewalk, but never dedicated to the public. The rooms were therefore front rooms, from which the view of the street was unobstructed. The plaintiffs hired the rooms for business purposes. The alterations which the defendants were proceeding to make would have the effect to interpose another room between the leased rooms and the street, and the plaintiffs' rooms would no longer be the front rooms of the building.

Alterations of this character are inconsistent with the rights of the plaintiffs under their lease. It could not have been understood at the time the lease was given that a right to make such alterations was reserved. It is not like the case of the erection of a building, either by a stranger or by the lessor, upon an adjoining lot, which is adapted to have a separate building erected upon it. In this case the lessor, or those holding his title, seek to make such changes in the building itself which contains the leased rooms as will essentially change their character. The subject of the lease is so materially changed that the rooms will no longer answer to the description of them in the lease, when the condition and situation of the premises are also looked at. The lease carries with it an implication that the lessor should not thus proceed to impair the character and value of the leased premises. Salisbury v. Andrews, 128 Mass. 336. Doyle v. Lord, 64 N. Y. 432.

We do not regard this view of the rights of the parties as at all inconsistent with the decision in Keats v. Hugo, 115 Mass. 204, and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a grant. In this case it is plain that the alterations are inconsistent with the rights of the plaintiffs under their lease.

Under this state of things the defendants might properly have been enjoined from proceeding with their proposed alterations. But the learned justice before whom the case was heard in the Superior Court took a different view of the rights of the parties, relying, it is said, upon Keats v. Hugo, 115 Mass. 204; and accordingly the plaintiffs' prayer for an injunction was refused. The defendants thereupon pro-

ceeded with the work, until now it is completed, so far at least as the external structure of the building is concerned. The lease to the plaintiffs will expire on the last day of February next, and, if the defendants were now ordered to pull down their structure, they might then restore it. The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this. Attorney General v. Algonquin Club, 153 Mass. 447. It would cause an unnecessary destruction of property. In view of the early termination of the plaintiffs' lease, their remedy should now be confined to compensation in damages, to reimburse them for the injury which they have suffered.

Decree accordingly.

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## DANIEL v. FERGUSON.

(Supreme Court of Judicature, 1891, 2 Ch. 27.)

The plaintiff was the owner of long leases of three adjoining houses, 49, 51, and 53 Hereford Road, Bayswater. In September, 1890, the Defendant prepared to build upon a piece of ground adjoining the south side of No. 49 a large building to be called Hereford Mansions. The plaintiff had the plans inspected on his behalf, and came to the conclusion that the proposed erection would materially affect the access of light and air to his houses. After some correspondence, the plaintiff, on the 28th of November, 1890, issued his writ in this action for an injunction, and on Saturday the 29th, notice of motion for injunction for Friday, the 5th of December, was by leave of the court served on the defendant, along with the writ. The service was between twelve and one o'clock. At two o'clock the defendant turned on a large number of men, who went on building all through the night and until 2 P. M. on Sunday. On Monday they resumed work, and ran up the wall adjoining No. 49 to the height of about thirty-nine feet from the ground.

On Monday, the 1st of December, the plaintiff, being informed of the rapid progress of the building, applied *ex parte* for an *interim* injunction till Friday, which was granted. Notice of this was given to the defendant on the same day, and he ceased building.

When the motion of which notice had been given was brought on, the defendant adduced evidence with a view to showing that the plaintiff had no easement of light over the defendant's land. . . .

The evidence as to the effect of the building went to show that it would seriously affect the light of No. 49.

The motion of which notice had been given came on to be disposed of on the 19th of December, and Mr. Justice Stirling made an order restraining the defendant until judgment or further order from building on the land in question so as to darken the lights of the plaintiff's houses, and from permitting the wall or building which he had erected to remain on his land.

The defendant appealed. . . .

LINDLEY, L. J. I am of opinion that this appeal must be dismissed without dealing with the question to be decided at the trial whether the plaintiff has an easement of light. It appears to be a nice question whether there was not at one time such a unity of possession as would prevent the plaintiff's houses from acquiring the easement. The plaintiff makes out a case entitling him to an injunction to keep matters in *statu quo* till the trial. That being so, the defendant, upon receiving notice that an injunction is going to be applied for, sets a gang of men to work and runs up his wall to a height of thirty-nine feet before he receives notice that an injunction has been granted. It is right that buildings thus run up should be pulled down at once, without regard to what the result of the trial may be.

KAY, L. J. I am of the same opinion. The questions to be decided at the trial may be of some nicety; but this is not the time to decide them. After the defendant had received notice on Saturday that an injunction was going to be applied for, he set a large number of men to work, worked all night and through nearly the whole of Sunday and by Monday evening, at which time he received notice of an interim injunction, he had run up his wall to a height of thirty-nine feet. Whether he turns out at the trial to be right or wrong, a building which he has erected under such circumstances ought to be at once pulled down, on the ground that the erection of it was an attempt to anticipate the order of the court. To vary the order under appeal would hold out an encouragement to other people to hurry on their buildings in the hope that when they were once up the court might decline to order them to be pulled down. I think that this wall

ought to be pulled down now without regard to what the result of the trial may be. The appeal will therefore be dismissed.

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## KREHL v. BURRELL.

(In Chancery, 1878, 7 Ch. D. 551.)

This was an action brought by the Plaintiff, as owner and occupier of a messuage or a public-house No. 27 Coleman Street, in the City of London, known as the "Three Tuns," with a restaurant and dining-room, to obtain an injunction to restrain the Defendant from erecting a building on the site of an adjoining court, called Windmill Court, over which the Plaintiff and his predecessors in title claimed an uninterrupted right of way to or from the said messuage for forty years. . . .

JESSEL, M. R. The plaintiff in this action was the owner of an inn or public-house, No. 37, Coleman Street, in the City of London, with which he and his predecessors in title had, and enjoyed for many years without interruption, a user of a way or passage, and he claimed to be entitled as of right to such user. The user was undoubted, and the right was never disputed until the purchase by the Defendant recently of the adjoining houses. The defendant threatened to obstruct the way, and the user of the passage or court, by erecting a large building. The Plaintiff gave notice to the Defendant that he was entitled to such way as of right, and on the Defendant persisting in his threats the Plaintiff brought an action, and issued a writ for an injunction on the 27th of April, 1876. Notwithstanding that the writ was issued, and in spite of the assertion by the Plaintiff of his rights, the Defendant, with full notice, and without any reasonable ground that I could discover at the trial of the action, and indeed without any ground at all, for none has been brought before me, insisted upon obstructing the way, and built over it a solid, and I am told, a large and expensive structure, which completely blocked it up. . . .

The question I have to decide is, whether the appeal to me by the Defendant to deprive the Plaintiff of his right of way, and give him money damages instead, can be entertained. I think it cannot. It is

true he has another way to his house by Coleman street; but it was obvious, when the facts were mentioned to me, that as regards the custom of the house it would be very seriously interferred with by depriving it of the back entrance, which was very much used, for special and intelligible reasons, by the customers. That being so, the question I have to consider is, whether the Court ought to exercise the discretion given by the statute, by enabling the rich man to buy the poor man's property without his consent, for that is really what it comes to. If with notice the right belonging to the Plaintiff, and in defiance of that notice, without any reasonable ground, and after action brought, the rich Defendant is to be entitled to build up a house of enormous proportions, at an enormous expense, and then to say in effect to the Court, "You will injure me a great deal more by pulling it down than you will benefit the poor man by restoring his right,"—of course that simply means that the Court in every case, at the instance of the rich man, is to compel the poor man to sell him his property at a valuation. That would be the real result of such a decision. It appears to me that it never could have been intended by the Legislature to bring such a result about. It never could have been meant to invest the Court of Chancery with a new statutory power somewhat similar to that with which railway companies have been invested for the public benefit under the Lands Clauses Act, to compel people to sell their property without their consent at a valuation. I am quite satisfied nothing of the kind was ever intended, and that, if I acceded to this view, instead of exercising the discretion which was intended to be reposed in me I should be exercising a new legislative authority which was never intended to be conferred by the words of the statute, and I should add one more to the number of instances which we have from the days in which the Bible was written until the present moment, in which the man of large possessions has endeavored to deprive his neighbor, the man with small possessions, of his property, with or without adequate compensation.

## COBB v. SAXBY.

(Supreme Court of Judicature, 1914, 3 K. B. 822.)

Action tried by Rowlatt J. without a jury.

The plaintiff was the owner in fee simple and occupier of certain premises, No. 33, King street, Margate, consisting of a dwelling-house with a shop on the ground floor. The defendant was the leaseholder and occupier of a house and shop, No. 35, King street, next to the plaintiff's house, the side walls of the two buildings being in contact with each other. Both houses opened directly into the street, but the front of the defendant's house projected into the street for a distance of eighteen inches beyond the front of the plaintiff's house.

In 1910 the plaintiff caused to be affixed to the front of his house and at right angles thereto two boards sixteen inches wide, one above the other, which reached from a point eight inches above the pavement to a height of twenty-two feet at a distance varying from two to nine inches from that part of the defendant's side wall which projected beyond the front of the plaintiff's house. There were no windows or doors or other openings in the defendant's side wall.

The action was brought by the plaintiff for an injunction to restrain the defendant from placing his advertisements on the boards. The defendant by his defence admitted he had acted wrongfully in so doing, and gave an undertaking not to repeat the trespasses and paid 40s. into Court which was accepted by the plaintiff in satisfaction of his claim; and the only question at the trial was that raised by the defendant's counter-claim.

The defendant by his counter-claim alleged (inter-alia) that the plaintiff's act in placing the boards where they were was wrongful, and the defendant had thereby suffered damage in that the boards obstructed the access to and diminished the enjoyment of the defendant's premises, and prevented him from examining and repairing his wall and from advertising on it and from making a door in it.

The defendant claimed damages and an injunction. . . .

Rowlatt, J. . . . For the purpose of my judgment I will assume, though it has not been strictly proved, that the title to the subsoil of that part of the roadway which is in the corner formed by the pro-

jection of the defendant's wall is in the plaintiff as the owner of No. 33. The position taken up by the plaintiff is, as I understand it, that if the defendant were at any time to make a doorway in the projecting part of his wall, he (the plaintiff) would not insist on maintaining the boards in such a position that they would interfere with the defendant's right of egress from his premises, and, therefore, I do not propose to deal with the case on the footing that the plaintiff is threatening to obstruct the egress from any door on the defendant's premises. But the plaintiff does claim the right to maintain the boards in their present position with the result that the defendant is prevented from using the wall for the purpose of placing advertisements on it, and the plaintiff says that he will only take the boards down at such reasonable times as the defendant may require for the purpose of repairing the wall and after reasonable notice.

In my opinion the contentions raised by the defendant's counterclaim are well founded. It is said on his behalf that the existence of these boards in their present position constitutes an invasion of the private rights which the defendant possesses by reason of the contiguity of his premises to the public highway. It is well settled law that the owner of land adjoining a highway has the private right of passing from his premises on to the highway, and if that right is obstructed and he brings an action against the person causing the obstruction, he is not in the position of a member of the public who complains of an obstruction to the highway which especially affects him, but he is a person who has a cause of action by reason of the interference with or obstructions to his private right. Although no authority precisely in point has been cited, I am of opinion that the owner of a house adjoining a public highway has precisely the same rights, as regards the highway, with respect to the wall of his house as he has in the case of a door or other entrance leading from his house on to the highway. He has the right to do anything he likes to the wall, for example to display advertisements upon it, and if these rights are invaded or obstructed, he has, in my opinion, a good cause of action against the person causing the interference with his rights. Take the case of a wall of a house adjoining a highway which has a window in it which the owner of the houses uses for the display of his goods, or suppose the owner of the house places on the wall pictures or advertisements of goods which he has for sale, it is to his interest that the members of the public using the highway should be

able to look in at the window or to gaze at the advertisements on the wall, and if any one prevents the public from so doing the rights of the owner of the wall are invaded. It is to my mind unthinkable that, if a man were to hold a screen in front of a shop window and thus prevent the public from looking in, he should be allowed to justify his so doing on the ground that, because he was not preventing egress from the shop to the highway, he was not interfering with any right of the owner of the shop. In my opinion, the law does not in those circumstances leave the owner of the premises without a remedy.

For these reasons I am of opinion that on the facts of this case the defendant is entitled to judgment on his counter-claim.

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## SECTION V. OBSTRUCTION OF PUBLIC RIGHTS.

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### FESSLER v. TOWN OF UNION.

(New Jersey Court of Chancery, 1904, 67 N. J. Eq. 14, 56 Atl. 272.)

The object of this bill is to restrain a nuisance in the nature of a purpresture. . . .

The complainant is the owner of ten lots, each twenty-five feet by one hundred feet, and each facing on Franklin street, in the town of Union, in the county of Hudson. The rear of six of which lots, and also the rear of two other lots of the same size which do not face on Franklin street, she alleges bound upon a public square which was dedicated to the public by the owners of a tract of land which comprised the complainant's lots, and many others in the neighborhood, by the usual mode of laying the plot out in streets and lots, filing the same in the county clerk's office and selling and conveying lots by reference to the map. . . .

The nuisance of which she complains is the erection of a fire-bell tower on that square and within about thirty feet of her premises. The structure is composed of iron posts, beams and braces. . . .

Pitney, V. C. I am of the opinion that the dedication in this case was for the purpose of use by the public as an open pleasure ground

—a ground with trees and a small lake, if the the latter was found desirable and practicable; that the dedication did not include the use of it for a public building, and that the defendant had no right under the original dedication to erect any building upon it. . . .

We come, then, to the question of the complainant's standing in this court.

The general rule is that any encroachment on a public highway or public square is an offense against the public, punishable by indictment only, and that one or more of the public cannot maintain an action at law or in equity therefor unless he is so situated as to be injured thereby in a manner and to an extent peculiar to himself as an individual as distinguished from himself as a member of the public at large.

The complainant is the owner of ten lots, comprising a boundary on the square in question of one hundred and fifty feet in the immediate neighborhood of the tower in question. It is within thirty feet of her house lot, and the existence in that place of the tower and the ringing of the bell in case of fire will, in my judgment, produce an effect injurious to the enjoyment of her property, different in a marked degree to that of the inhabitants generally of the town of Union, which is a closely built town of from fifteen thousand to twenty thousand inhabitants.

There may be a few other lot owners in the immediate vicinity who are interested in the same degree, or nearly so, as the complainant, and they may have the same standing as the complainant, but the fact that they have not joined in this suit, or brought a suit on their own account, cannot prejudice the rights of the complainant, if those rights are, as I suppose them to be, peculiar to her by reason of her vicinity to the square.

But, of course, if I am right in my conclusion that she has, by reason of her owning lands bounding on the square, a right in the nature of a private right, then she has a right in addition to her being a member of the public, which dispenses with the necessity of resorting to the doctrine of peculiar injury.

Next as to her right to maintain an action against a municipality.

No point was raised by counsel for the defendant that his client was entitled to any immunity from action if, in point of fact, its action was unwarranted by law; and no case was cited by counsel on either side bearing precisely on this point, nor have I been able to find any.

Moreover I find no case, in this state at least, where the municipal authorities have ever been charged with a breach of their trust in that behalf.

But I think, upon general principles, the complainant must have a right of equitable action, otherwise the inhabitants not especially interested in the existence of that square might unite and elect a common council which might be so far recreant to its duty and regardless of the rights of the landowners as to obliterate the square absolutely and devote it to business purposes. . . .

I think that the complainant is entitled to a decree against the municipality providing for the removal of the tower and of all its constituent parts, and that she is entitled to recover her costs besides a reasonable counsel fee, which I shall fix upon hearing parties.

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## THE STATE v. THE OHIO OIL COMPANY

(Supreme Court of Indiana, 1897, 150 Ind. 21, 49 N. E. 809.)

McCabe, J. The State of Indiana, by her Attorney-General and the prosecuting attorney of the Madison Circuit Court, brought suit against the appellee, the Ohio Oil Company, seeking to enjoin it from wasting natural gas. . . .

The appellee contends that "the question of the exhaustion of the gas is certain according to the averments in both the injunction cases, and the question, therefore is, who shall be permitted to exhaust it." "The State contends," says appellee, "that the manufacturers and gas companies shall be allowed that privilege for the purpose of bargain and sale, although it incidentally avers benefit to the people, and all this to the exclusion of an oil company which is also using gas for the purpose of a legitimate business. In such matters of private concern the State has no interest and should not have any."

It is true the production of oil is a legitimate business, but the waste and destruction of natural gas which appellee's demurrer admits it is engaged in, defiantly, constantiy, and in utter contempt of the laws of Indiana, and the welfare and comfort of its citizens, is not only a legitimate business, but has been placed under the ban of two prohibitory statutes in this State. Sections 2316-2318, Burns'

R. S. 1894 (Acts 1891, p. 55); section 7510, Burns' R. S. 1894 (Acts 1893, p. 300). Section 1 of the latter act provides: "That it shall be unlawful for any person, firm or corporation having possession or control of any natural gas or oil well, whether as a contractor, owner, lessee, agent or manager, to allow or permit the flow of gas or oil from any such well to escape into the open air, without being confined within such well or proper pipes, or other safe receptacle for a longer period than two days next after gas or oil shall have been struck in such well. And thereafter all such gas or oil shall be safely and securely confined in such well, pipes or other safe and proper receptacles." The constitutionality of the latter act is assailed by the appellee. But the former act, being very much of the same nature as regards its constitutionality as the latter, was assailed by the appellant in Townsend v. State, 147 Ind. 624, for every conceivable constitutional objection, and for every objection urged to the act now under consideration, and this court in that case upheld the constitutionality of that act. . . .

Appellee's counsel have conceded that the pressure in gas wells since the discovery of gas in this State has fallen from 350 pounds to 150 pounds. This very strongly indicates the possibility, if not the probability, of exhaustion. In the light of these facts, one who recklessly, defiantly, persistently, and continuously wastes natural gas, and boldly declares his purpose to continue to do so, as the complaint charges appellee with doing, all of which it admits to be true by its demurrer, ought not to complain of being branded as the enemy of mankind. But appellee tries to excuse its conduct on the score that it cannot mine and utilize oil under and in its land without wasting the gas. But there is nothing in the record to bear out that claim. However, if there was, it would not furnish a valid excuse. It is not the use of unlimited quantities of gas that is prohibited, but it is the waste of it that is forbidden. The object and policy of that inhibition is to prevent, if possible, the exhaustion of the store-house of nature, wherein is deposited an element that ministers more to the comfort, happiness, and well-being of society than any other of the bounties of the earth. Even if the appellee cannot draw oil from its well without wasting gas, it is not denied that it may draw gas therefrom, and utilize it without wasting the oil. But, even if it can not draw oil from such wells without wasting gas, and is forbidden by injunction so to do, it is only applying the doctrine that the owner must so use

his own property as not to injure others. It may use its wells to produce gas for a legitimate use, and must so use them as not to injure others or the community at large. The continued waste and exhaustion of the natural gas of Indiana through appellee's wells would not only deny to the inhabitants the many valuable uses of the gas, but the State, whose many quasi-public corporations have many millions of dollars invested in supplying gas to the State and its inhabitants, will suffer the destruction of such corporations, the loss of such investments and a source of large revenues. To use appellee's wells as they have been doing, they injure thousands and perhaps millions of the people of Indiana, and the injury, the exhaustion of natural gas, is not only an irreparable one, but it will be a great public calamity. The oil appellee produces is of very small consequence as compared with that calamity which it mercilessly and cruelly holds over the heads of the people of Indiana, and, in effect, says: "It is my property, to do as I please with, even to the destruction of one of the greatest interests the State has, and you people of Indiana help yourself if you can. What are you going to do about it?"

We had petroleum oil for more than a third of a century before its discovery in this State, imported from other states, and we could continue to do so if the production of oil should cease in this State. But we cannot have the blessings of natural gas unless the measures for the preservation thereof in this State are enforced against the lawless. We therefore conclude that the facts stated in the complaint make a case of a public nuisance which the appellant has a right to have abated by injunction, and that the complaint states facts sufficient to constitute a cause of action. Hence, the circuit court erred in sustaining appellee's demurrer to the complaint. The judgment is reversed, and the cause remanded, with instructions to overrule said demurrer, and require the defendant to answer the complaint, and for further proceedings in accordance with this opinion.

## SECTION VI. PUBLIC NUISANCE.

### EVERETT v. PASCHALL.

(Supreme Court of Washington, 1910, 61 Wash. 47, 111 Pac. 879.)

CHADWICK, J. The findings of the trial judge show that plaintiffs are the owners of, and reside upon, lot 14, block 19, Madison Park

addition to the city of Seattle, in King County; that their property is of the value of $2,000. Defendant is the owner of the south half of lots 12 and 13, block 9, upon which a cottage is situated. An alleyway separates plaintiffs' lot from the fractional lots of the defendant. On November 29, 1909, defendant opened, and has since maintained in his cottage, a private sanitarium for the treatment and care of persons afflicted with tuberculosis. The sanitarium has a capacity for accommodating ten patients, and since opening, there have been from four to ten patients under treatment. . . .

The text of our decision has been aptly stated by counsel for appellant: "Can a tuberculosis hospital be maintained in a residential portion of a city, where its maintenance depreciates the value of contiguous property from thirty-three and one-third to fifty per cent, and where its existence detracts from the comfortable use of such residential property?" In the evolution of the law of nuisance, there has grown an element not clearly recognized at common law. Blackstone, 3 Com. 216, has defined a nuisance to be "anything that worketh hurt, inconvenience, or damage"; reducing the nuisances which affect a man's dwelling to three, (1) overhanging it; (2) stopping ancient lights, and (3) corrupting the air with smells. It will be seen that, within these definitions, the maintenance of a sanitarium conducted with due attention to sanitation is not a nuisance, for it creates no physical inconveniences whatever. But a new element in the law of nuisance has been developed, first by judicial decisions, and later, by declaratory statutes—that is, the comfortable enjoyment of one's property. It is written in the statutes of this state: "Nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency . . . or in any way renders other persons insecure in life, or in the use of property." Rem. & Bal. Code, § 8309.

Respondent contends, and the court has found, that the property of respondent is not a nuisance *per se,* and that it is so conducted that it is not, and cannot be, a nuisance by reason of its use; that there is no real danger; that the fear or dread of the disease is, in the light of scientific investigation, unfounded, imaginary, and fanciful; and that the injury, if any, is *damnum absque injuria.* On the other hand, the appellants insist that the location of a sanitarium for the treat-

ment of a disease, of which there is a positive dread which science has so far failed to combat, so robs them of that pleasure in, and comfortable enjoyment of, their home as to make it an actionable nuisance under the statute; and furthermore, under the findings of the court, that the presence of the sanitarium in a district given over to residences, and which have depreciated property from thirty-three to fifty per cent, is such a deprivation of property as will warrant a decree in their favor under the maxim *sic utere tuo ut alienum non laedas.*

Waiving for the present the substantial pecuniary damage which the court found to exist, and addressing ourselves to the principle underlying the lower court's decree—that is, that the danger being only in the apprehension of it, a fear unfounded and unsustained by science, a demon of the imagination—the courts will take no account of it; if dread of the disease and fear induced by the proximity of the sanitarium, in fact, disturb the comfortable enjoyment of the property of the appellants, we question our right to say that the fear is unfounded or unreasonable, when it is shared by the whole public to such an extent that property values are diminished. The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. That fear is real in the sense indicated, and is the most essential human of all emotions, there can be no doubt. Mr. Fernande Mazade has addressed his inquiries to this subject, and has but recently given his views, as well as the opinions of others, in the Paris Revue. Current Literature, Vol. 49, No. 3, p. 290 (Sept. 1910). The opinions collected are worth noticing. Alfred Capus, the psychological playwright, says: "Fear consists in capitulating to the instinct of self-preservation." M. Frederick Passy, of the Institute, "The bravest of men have known what fear is." M. Sicard, a professor of the Faculty of Medicine, considers fear or courage to be the result of temperament, training, and thought and which can be partially eradicated by reasoning and education, but never to be overcome in its most acute form, namely, the instinct of self-preservation. The conclusion of the editor is that, "it is far from being unanimously admitted that fear is a ridiculous malady, or one of which one need be ashamed in ordinary circumstances."

Comfortable enjoyment means mental quiet as well as physical comfort. In Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, under conditions which "greatly disturb the comfort and nerves and sleep of the inmates of complainants' home, and she and her family were greatly annoyed and distressed in mind," an injunction was sustained against the hospital as destructive to the peace, quiet, and comfort of the complainant. What "comfortable enjoyment" may be, must be determined by reference to the substantive word "comfort." This word has not been specifically defined in connection with nuisance cases. In Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654, Chancellor Zabriskie says: "No precise definition can be given; each case has to be judged by itself;" but in Forman v. Whitney, 2 Keyes (N. Y.) 165, Webster's definition is adopted: "It implies some degree of positive animation of the spirits, or some pleasurable sensations derived from happy and agreeable prospects;" the court adding: "The word embraces whatever is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment."

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measunable, or subsisting. But in all cases, in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. Each case must be judged by itself. Joyce, Nuisance, 19. Regard should be had for the notions of comfort and conveniences entertained by persons generally of ordinary tastes and susceptibilities. Columbus Gas & Coke Co. v. Freeland, 12 Ohio St. 392; Barnes v. Hathorn, 54 Me. 124. The nuisance and discomfort must affect the ordinary comfort of human existence as understood by the American people in their present state of enlightenment. Joyce, Nuisance, § 20. The theories and dogmas of scientific men, though provable by scientific reference cannot be held to be controlling unless shared by the people generally. In Grover v. Zook, 44 Wash. 494, 87 Pac. 638, this court said: "That pulmonary tuberculosis is both contagious and hereditary, as these terms are understood (although not in a strictly technical and professional sense), as well as infectious admits of little, if any, doubt."

This principle applies with peculiar force in this case, for aside from the general dread of the disease, as found by the court, it is

also shown that the security of the public depends upon proper precautions and sanitation, which may at any time be relaxed by incautious nurses or careless or ignorant patients.

Furthermore, the court found that the bacilli of the disease may be carried by house flies, Thus, every house fly that drones a summer afternon in the drawing room or nursery is a constant reminder to plaintiffs of their neighbor, tending to disquiet the mind and render the enjoyment of their home uncomfortable.

The only case we find holding that fear alone will not support a decree in this class of cases is Anonymous, 3 Atk. 750, where Lord Hardwicke said: "And the fears of mankind, though they may be reasonable ones, will not create a nuisance." Our statute modifies, if indeed it was not designed to change this rule. Under the facts, we cannot say that the dread which is the disquieting element upon which plaintiffs' complaint is made to rest, is unreal, imaginary, or fanciful. In so doing, we are not violating the settled principles of the law, but affirming them. We conceive the case of Stotler v. Rochelle (Kan.), 109 Pac. 788, to be directly in point. There we find the same contentions made as here. The question was, whether the fear of cancer was sustained in the light of medical authority. The court said:

"In the present state of accurate knowledge on the subject it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease under the conditions stated, the fear of it is not entirely unreasonable."

The unusual feature of that case, in that judicial notice is taken of the fact that fear may be urged as a ground for injunctive relief, challenged the interest of the Hon. John D. Lawson, the learned editor of the American Law Review. He takes no issue with the rule. He says:

"A hospital, said the court, is not a nuisance *per se,* or even *prima facie,* but it may be so located and conducted as to be a nuisance to people living close to it. The question was not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However

carefully the hospital might be conducted, and however worthy the institution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the oversensitive alone, but to persons of normal sensibilities. The court concluded that upon these considerations the injunction was rightfully granted. The plaintiff, as the owner and occupant of adjacent property, had such a peculiar interest in the relief sought as to enable him to maintain the action." Vol. 44, American Law Review, No. 5, p. 759.

In the case of Baltimore v. Fairfield Imp. Co. 87 Md. 352, 39 Atl. 1081, 67 Am. St. 344, 40 L. R. A. 494, an injunction against placing a leper in a residence neighborhood for care and restraint was justified upon the ground that the disease produced a terror and dread in the minds of the ordinary individual. In that case, the court said:

"Leprosy is and has always been, universally regarded with horror and loathing. . . . The horror of its contagion is as deep-seated today as it was more than two thousand years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries cannot in this day be shaken or dispelled by mere scientific asseveration or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located."

In Cherry v. Williams, 147 N. C. 452, 61 S. E. 267, 125 Am. St. 566, a temporary restraining order was granted against the maintenance of a tuberculosis hospital, notwithstanding evidence was introduced, as in this case, tending to show that the establishment of such a hospital, if properly maintained and conducted, would not be a menace to the health of the community, but in fact a benefit. We have no cases in this state directly in point, yet a case not without bearing is that of Shepard v. Seattle, 59 Wash. 363, 109 Pac. 1067. Judge Rudkin, delivering the opinion of the court said:

"The presence of a private insane asylum, with its barred windows, and irresponsible inmates, would annoy, injure, and endanger the comfort, safety, and repose of any person of average sensibilities, if located within two hundred feet of his place of abode. In other words, it is a matter of common knowledge that the presence of such an institution in a residential portion of a city, would practically destroy the value of all property within its immediate vicinity for residence purposes."

We therefore conclude that the lower court erred in denying an injunction. The case is remanded with instructions to enter a decree upon the finding in favor of appellant.

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## COMMONWEALTH v. McGOVERN.

(Court of Appeals of Kentucky, 1903, 116 Ky. 212, 75 S. W. 261.)

Opinion of the court by Judge Settle—Reversing.

This equitable action was instituted in the Jefferson circuit court, common pleas division, by the appellant, the Commonwealth of Kentucky, on relation of the Attorney General, against the appellees, Terry McGovern and others, to prevent the holding of a prize fight advertised to take place on the 22nd day of September, 1902, in the Auditorium, a large theater situated in the city of Louisville. Terry McGovern and Young Corbett were to be the combatants, and their managers and the owners of the Auditorium were made parties to the action. . .

Is the use of land or a building for the maintenance of prize-fighting a public nuisance? In Wood on Nuisances (3rd Ed.), section 68, the author says: "A public exhibition of any kind that tends to the corruption of morals, or to disturbance of the peace or of the general good order or welfare of society, is a public nuisance. Under this head are included all puppet shows, legerdemain, and obscene pictures, and all exhibitions, the natural tendency of which is to pander to vicious tastes, and to draw together the vicious and dissolute members of society." That a prize-fight is an exhibition of the character here described, and consequently a public nuisance, there can be no doubt; and, if so, the use of a theater for prize-fighting is such a nuisance. Therefore the Legislatures of many of the States have

enacted laws for their suppression, realizing, no doubt, that the remedies afforded by the general laws were not adequate to that end; and the courts have been uniform in upholding the statutes thus enacted. Thus, in Sullivan v. State, 67 Miss. 352, 7 South. 276, the Supreme Court of Mississippi said: "We think, however, that the evil sought to be protected against by the statute is the debasing practice of fighting in public places, or places to which the public, or some part of it, is admitted as spectators."

Such a meeting as would have been held in the Auditorium, in Louisville, to witness the prize-fight between McGovern and Corbett, if that fight had occurred, would doubtless have attracted some of the better and law-abiding class of citizens, curious to see such a spectacle as a prize-fight; but for every such reputable citizen thus attending, there would have been present a dozen gamblers, confidence men, bunco steerers, or pickpockets, gathered from all parts of the United States, men of idle, vicious and criminal habits and practices, whose business is to prey upon the public in some form or other, and many of them would remain in the community after the combat to ply their nefarious callings. Such an assembly could easily be led into a riot, or other unlawful disturbance of the public peace. In addition to the evils suggested, there would be the contaminating effect of such a meeting upon the youth of the city and State, which might prove of incalculable injury to their morals and future welfare. Such a gathering, too, would demand increased vigilance in the protection of the property of the city and its inhabitants, be a menace to good order, and disturb the peaceful pursuits and happiness of citizens who would be unwilling to patronize such an enterprise.

We conclude, therefore, that while a court of equity may not grant an injunction against the principals who were expected to engage in the fight in question, nor those connected with them as managers, trainers, etc., because the process of the criminal courts and the powers of conservators of the peace in the city of Louisville are, or ought to be, adequate to the prevention of the prize-fight, by the arrest and prosecution of the parties concerned, yet it was proper for the lower court to enjoin the owner, proprietor and manager of the Auditorium theater from permitting the holding of a prize-fight therein, and from allowing therein any future exhibitions of the same character, upon the ground that such a use of the building would constitute a public nuisance, dangerous to the public morals and safety. We think this

exercise of power by the court can not be questioned, not because any new powers were conferred upon it by the statute against prize-fighting, but because such jurisdiction exists in courts of equity, and has practically always so existed, and, further, because its exercise was required in this instance by the exigencies of the case and the express language of the statute, which commanded the court to use all the power with which he was vested, to the end that the nuisance might be suppressed.

As already suggested, not the least of the evils connected with the holding of the prize-fight would be the presence of the immense crowds of lawless and turbulent men from all quarters. An injunction against the use of the building advertised as the place of the fight would go far toward preventing the assembling of this crowd, and thereby avert incalculable mischief, which could not well be averted by the criminal courts, or their ministerial officers, after the meeting of the audience at the place of the combat, or in the act of assembling; for, although every person who attends a prize-fight by that act violates the law, it would be impossible for the officers of the law to arrest any considerable number of them under such circumstances.

We do not regard this case as analogous to that of Neaf v. Palmer, 103 Ky., 496, 20 R., 176, 45 S. W., 506. In the latter case the action was brought by several property owners to enjoin the maintenance of a bawdy house upon the property of another. In passing upon the questions involved, this court said, in part: "It is not alleged that there are offensive sights or sounds about the obnoxious premises, but only that the property is made less valuable in the vicinity, and that the moral atmosphere is tainted and pestilential. The injury is wholly consequential. It seems to us, under these circumstances, criminal courts had best be left to enforce the criminal laws. They are confessedly adequate for the purpose of suppressing such evils."

There was nothing in the case, supra, to indicate that the bawdy house complained of could not be suppressed by the ordinary methods appertaining to the criminal court, and, the damages resulting to the plaintiff's property from the existence of the bawdy house being wholly consequential and speculative, it would, of course, have been improper in that case to employ the writ of injunction in aid of the mere property rights of the individual. But in the case at bar the complainant is the State,—the sovereign—which is seeking by a writ

of injunction to prevent a great evil, affecting the people of the city of Louisville, and the entire State as well, and which threatens irreparable injury to the public morals because of its cruelty, inhumanity, and debasing associations, and danger to the public safety because of its bringing together the lawless and turbulent elements of society from all quarters. Upon such a state of facts, and with the commands of the statute directing him to employ all his powers to avert the threatened evil, it was, in our opinion, no stretch of authority for the chancellor to employ the aid of the writ of injunction in such an emergency, to the extent, at least, of preventing the use of real property for the holding of the prize-fight. Nor do we think that the right of the chancellor to so employ the writ of injunction in this case is dependent upon the fact that a property right be involved. It may be justified upon the higher ground that the morals and safety of the public are involved, and that the public good is of the first consideration. . . .

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## GEORGIA v. TENNESSEE COPPER CO.

(United States Supreme Court, 1906, 206 U. S. 230.)

Holmes, J. This is a bill in equity filed in this court by the State of Georgia, in pursuance of a resolution of the legislature and by direction of the Governor of the State, to enjoin the defendant Copper Companies from discharging noxious gas from their works in Tennessee over the plaintiff's territory. It alleges that in consequence of such a discharge a wholesale destruction of forests, orchards and crops is going on, and other injuries are done and threatened in five counties of the State. It alleges also a vain application to the State of Tennessee for relief. A preliminary injunction was denied, but, as there was ground to fear that great and irreparable damage might be done, an early day was fixed for the final hearing and the parties were given leave, if so minded, to try the case on affidavits. This has been done without objection, and, although the method would be unsatisfactory if our decision turned on any nice question of fact, in the view that we take, we think it unlikely that either party has suffered harm.

The case has been argued largely as if it were one between two private parties; but it is not. The very elements that would be relied upon in a suit between fellow-citizens as a ground for equitable relief are wanting here. The State owns very little of the territory alleged to be affected, and the damage to it capable of estimate in money, possibly, at least, is small. This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power. The alleged damage to the State as a private owner is merely a makeweight, and we may lay on one side the dispute as to whether the destruction of forests has led to the gullying of its roads.

The caution with which demands of this sort, on the part of a State, for relief from injuries analogous to torts, must be examined, is dwelt upon in Missouri v. Illinois, 200 U. S. 496, 520, 521. But it is plain that some demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisance impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court. Missouri v. Illinois, 180 U. S. 208, 241.

Some peculiarities necessarily mark a suit of this kind. If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice it may insist that an infraction of them shall be stopped. The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account, we cannot give the weight that was given them in argument to a comparison between the damage threatened to the plaintiff and the calamity

of a possible stop to the defendants' business, the question of health, the character of the forests as a first or second growth, the commercial possibility or impossibility of reducing the fumes to sulphuric acid, the special adaptation of the business to the place.

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source. If any such demand is to be enforced this must be, notwithstanding the hesitation that we might feel if the suit were between private parties, and the doubt whether for the injuries which they might be suffering to their property they should not be left to an action at law.

The proof requires but a few words. It is not denied that the defendants generate in their works near the Georgia line large quantities of sulphur dioxid which becomes sulphurous acid by its mixture with the air. It hardly is denied and cannot be denied with success that this gas often is carried by the wind great distances and over great tracts of Georgia land. On the evidence the pollution of the air and the magnitude of that pollution are not open to dispute. Without any attempt to go into details immaterial to this suit, it is proper to add that we are satisfied by a preponderance of evidence that the sulphurous fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case within the requirements of Missouri v. Illinois, 200 U. S. 496. Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

It is argued that the State has been guilty of laches. We deem it unnecessary to consider how far such a defense would be available in a suit of this sort, since, in our opinion, due diligence has been shown. The conditions have been different until recent years. After the evil had grown greater in 1904 the State brought a bill in this court. The defendants, however, already were abandoning the

old method of roasting ore in open heaps and it was hoped that the change would stop the trouble. They were ready to agree not to return to that method, and upon such an agreement being made the bill was dismissed without prejudice. But the plaintiff now finds, or thinks that it finds, that the tall chimneys in present use cause the poisonous gases to be carried to greater distances than ever before and that the evil has not been helped.

If the State of Georgia adheres to its determination, there is no alternative to issuing an injunction, after allowing a reasonable time to the defendants to complete the structures that they now are building, and the efforts that they are making, to stop the fumes. The plaintiff may submit a form of decree on the coming in of this court in October next.

Injunction to issue.

MR. JUSTICE HARLAN, concurring. The State of Georgia, is, in my opinion, entitled to the general relief sought by its bill, and, therefore, I concur in the result. With some things, however, contained in the opinion, or to be implied from its language, I do not concur. When the Constitution gave this court original jurisdiction in cases "in which a State shall be a party," it was not intended, I think, to authorize the court to apply in its behalf, any principle or rule of equity that would not be applied, under the same facts, in suits wholly between private parties. If this was a suit between private parties, and if under the evidence, a court of equity would not give the plaintiff an injunction, then it ought not to grant relief, under like circumstances, to the plaintiff, because it happens to be a State possessing some powers of sovereignty. Georgia is entitled to the relief sought, not because it is a State, but because it is a party which has established its right to such relief by proof. The opinion, if I do not mistake its scope, proceeds largely upon the ground that this court, sitting in this case as a court of equity, owes some special duty to Georgia as a State, although it is a party, while under the same facts, it would not owe any such duty to the plaintiff, if an individual.

## WESSON v. WASHBURN IRON CO.

(Supreme Court of Massachusetts, 1866, 95 Mass. 95.)

At the trial in this court, before Colt, J., the plaintiff introduced evidence tending to show that she had an estate for life in two dwelling-houses adjacent to premises used and occupied by the defendants for a rolling mill for the manufacture of railroad iron; that during the period complained of great quantities of smoke, cinders and dust came constantly from the defendants' works into said houses, to an extent, when the wind was east, enough to suffocate persons, making the houses black inside and out, covering the bed clothes and tablecloths with dust, and making the houses uncomfortable and unfit for habitation; that the defendants kept constantly in operation, by night and day, a trip-hammer capable of striking a blow of from seventy-five to one hundred tons, the effect of which was to jar the house so as to cause the plastering to crack and fall down repeatedly, so that no clock could run in one of the houses; that one of the houses had formerly been used as a tavern, but its use as such had been discontinued since the use of the trip-hammer, except that guests were occasionally received, who, after going to bed, had frequently come down late at night and gone to another hotel. . . .

The plaintiff requested the court to instruct the jury that if her dwelling-house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust and gas from the defendants' works, it was no defence to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with the request of the defendants, that the plaintiff could not maintain this action if it appeared that the damage which the plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood. . . .

Bigelow, C. J. . . . There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in

his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own reports. Stetson v. Faxon, 19 Pick. 147. Thayer v. Boston, 19 Pick. 511, 514. . . .

But it will be found that, in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace or comfort in their dwellings is impaired by the carrying on offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstruct-

ed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Now would such a doctrine be consistent with sound principles Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that in effect a wrongdoer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution,

unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumsstances which would render the guilty party liable to indictment for a common nuisance. . . .

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## SECTION VII. COMMON LAW COPYRIGHT—STATUTORY MONOPOLIES.

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### HASKINS v. RYAN.

(New Jersey Court of Chancery, 1906, 71 N. J. Eq. 575, 64 Atl. 436.)

STEVENS, V. C. To the bill in this case a general demurrer is pleaded. The bill alleges, in substance, that during the years 1898 and 1899, 1900 and 1901, the complainant devoted a large part of his time to the study of industrial conditions connected with the output of pig lead in the United States, and had conceived the plan of uniting the outstanding lead interests, which had not already become a part of the National Lead Company, into one company, and had either procured options thereon or had opened negotiations for their purchase; that in the spring of 1891 "he had crystallized and formulated a complete plan for the combination of the white lead industries in the United States not already in the National Lead Company; that he laid such plans before the defendant, a capitalist; that he sought his co-operation and aid, and himself agreed to contribute, if necessary, as much as $200,000 if the defendant would join him therein, and also contribute enough to carry the enterprise through."

The bill alleges further that defendant, to quote from the bill, "expressed a willingness to join your orator therein, provided an examination of the plan and papers by the attorneys, and experts of said

Ryan (the defendant) confirmed the statements of your orator made to him."

The bill then alleges that the complainant submitted the plan to Ryan's attorney, and was subsequently told by him that he had submitted it to Ryan, and had endorsed it "as comprehensive, feasible and attractive;" that through the efforts of Ryan's agents, options had been obtained upon most, if not all, of the properties upon which the complainant had options, that on January 20th, 1903, the United Lead Company was organized as a corporation under the laws of New Jersey, and, under the direction and control of Ryan, proceeded to acquire, and now owns, the interests in nearly all the companies, firms and individuals named in complainant's plan, and is capitalized with a capital stock of $15,000,000 and has issued bonds for $17,000,000; that in the formation and exploitation of this company, the defendant, Ryan, "has made an enormous profit, the amount of which is unknown to complainant," and that a combination substantially as planned by complainant has taken place, or is about to take place, with the result of great profits to said Ryan.

The bill then charges that Ryan's act of availing himself of the information complainant has collected and has only disclosed to Ryan "upon the agreement and understanding on the part of the said Ryan that he would join your orator in the said scheme and share with him in the profits arising therefrom is contrary to equity," but I do not understand that by this general charge it is intended to allege any other understanding or agreement than that contained in the stating part of the bill, viz., that Ryan had expressed a willingness to join complainant in his project, provided an examination of it by Ryan's attorneys and experts should confirm complainant's statements. The bill asks for a discovery and account of Ryan's profits and a decree that complainant is entitled to a share of them. Ryan is the sole defendant.

It is perfectly plain that no recovery can be had in this case on the basis of a completed agreement broken by Ryan. The plan, a copy of which is appended to the bill, contemplates the raising of $15,000,000 for the purpose of acquiring the properties of the various concerns, twenty-two in number, other than that of the National Lead Company. The raising of a fund with which to purchase these properties was of the essence of the plan, but complainant had not bound

himself to contribute any definite sum, and Ryan had not bound himself to contribute anything. Even if, without direct averment, we should infer than an examination of the plan and papers had been made by Ryan's experts, and that such examination confirmed complainant's statements to Ryan, nothing more is shown than that Ryan agreed to join in the plan—that is, agreed to enter into a definite and explicit agreement on the subject. But nothing is better settled than that equity will not compel the specific performance of an agreement to make an agreement. Lane v. Calvary Church, 59 N. J. Eq. (14 Dick.) 413; affirmed on appeal.

An account on the basis of a completed agreement is therefore quite out of the question.

As I understand the complainant's argument, he does not rest his case on any such basis. His contention is this: The plan is my property. The defendant has appropriated it to his own use. I claim an account of the profits arising from its appropriation.

If in point of fact the plan has been wrongfully taken or appropriated, the remedy, if any, would appear to be an action on the case for damages, the amount being its fair value. But the plaintiff does not, and in this court could not, demand damages. He asks for a discovery and an account of profits.

The fact that he has not been able to cite any precedent for the claim he makes is not, of itself, conclusive if he can bring himself within the principle upon which an account is given.

The complainant has undoubtedly the right to claim protection in this court for his manuscript. It would seem that, without any reference to whether the plan is or is not open to the objection that it seeks to create a monoply (Kerr. Inj. 186; Oliver v. Oliver, 11 C. B. (N. S.) 139), he would have the right to restrain its publication or to prevent its use; and in the case of an author the law does more than protect the manuscript regarded as a material thing of ink and paper. The combination of words of which it is composed (whether written down, or acted or sung before an audience admitted on payment of a fee) is also protected, and publication is restrained even if the manuscript be destroyed and an attempt be made to reproduce it from a copy rightfully in the possession of another, or even from memory. The work is protected indefinitely, before publication, by the common law (Aronson v. Baker, 43 N. J. Eq. (16 Stew.) 366; New Jersey

State Dental Association v. Dentacura Company, 57 N. J. Eq. (12 Dick.) 594; 58 N. J. Eq. (13 Dick.) 582), and for a limited time, after publication, by the statutory law of copywright. The law has never attempted to go beyond this and to enjoin, for the benefit of the author, after publication, the use of the ideas contained in his work.

In the case of secret processes of manufacturing, the law does, to a certain extent, enjoin the use of ideas. It would, of course, on the same principle on which it affords protection to the unpublished manuscript in the hands of the author, enjoin the publication or exhibition of the paper containing the formula; but it does more. In enjoining the use of the formula it restrains the wrong-doer from putting the idea formulated to practical account. Stone v. Grasselli Company, 65 N. J. Eq. (20 Dick.) 756. The protection ends when the secret becomes known. In the case of patent rights the statute goes still further. It affords protection for a limited period to a certain class of ideas, known as useful inventions, after the inventor has published them to the world, and because he has so published them. The valuable right here protected is not, as in the case of copyright, the manuscript or writing regarded as a peculiar combination of words or figures, but the idea or conception to which those words or figures give rise, so far as that idea or conception may admit of material embodiment. If the idea contained in the patented device of A suggests to the mind of B another idea, which would not have arisen in the mind of B but for the stimulus of the prior idea, A can claim no property in that, and yet B has mentally appropriated A's idea and made it the basis of his own, and I do not suppose that it has ever been contended that the entire public are not at liberty to subject A's idea to such investigation and discussion as it may desire. The wrong does not commence until the attempt is made to make or dispose of its material embodiment.

I now come to the precise question here involved. It is this: Has the complainant a property right in the scheme or idea to be found in his plan as contradistinguished from the property right which he has in his manuscript, regarded as a combination of words and figures, a thing of ink and paper?

A right is defined to be that interest which a person actually has in any subject of property, entitling him to hold or convey it at pleasure. But that can hardly be styled property over which there is

not some sort of dominion. Now, as I have already said, the combination of words and figures contained in complainant's plan belongs to him absolutely. Its publication or reproduction or exhibition in any form may be enjoined. But the idea contained in the plan differs from the ideas to which I have already called attention in this important respect: It involves the voluntary action and co-operation of many different men. When I say voluntary action, I mean action not restrained by contract, for the allegation that complainant had "options" is altogether too vague to warrant an inference that they are still subsisting, or that complainant had the means of availing himself of them without the aid of outside capital. Besides, the allegation is not that he has procured options on all the properties which it was proposed to combine, but that he either had options on them or had "opened negotiations for their purchase." The means of carrying out the plan; of giving effect to the idea lay, therefore, beyond his control. It was an idea depending for its realization upon the concurring minds of many individuals, each of them unbound by contract and free to act as he chose. Such a project or idea can scarcely be called property. It lacks that dominion—that capability of being applied by its originator to his own use—which is the essential characteristic of property. It differs fundamentally from the secret process of patented invention which is capable of material embodiment at the will of the inventor alone. It is worthless unless others agree to give it life. It was, as far as complainant was concerned, an idea pure and simple. Now, it has never, in the absence of contract or statute, been held, so far as I am aware, that mere ideas are capable of legal ownership and protection. Says Lord Brougham, in delivering his judgment in Jeffreys v. Boosey, 4 H. L. Cas. 965: "*Volat irrevocabile verbum,* whether borne on the wings of the wind or the press, and the supposed owner instantly loses all control over it. . . He has produced the thought and given it utterance, and *eo instanti* it escapes his grasp."

Justice Yates, in his dissenting opinion in the great case of Millar v. Taylor, 4 Burr. 2303, 2366 (an opinion which was afterwards concurred in by the house of lords), said: "Where are the *indicia* or distinguishing marks of ideas? What distinguishing marks can a man fix upon a set of intellectual ideas so as to call himself the proprietor of them? They have no earmarks upon them." A case much like the

present is that of Bristol v. Equitable Assurance Society of New York, 5 N. Y. Sup 131; 132 N. Y. 264. There the complainant confidentially disclosed to the president of a life insurance company a system of soliciting life insurance devised by him. It was alleged that the company, after the disclosure, used the plan without complainant's consent. On demurrer, it was held that the plaintiff could not recover for the alleged use.

I am therefore of opinion that complainant has no property right in his plan regarded as an idea. Having no property right he has no right to an account.

But if a court of equity cannot treat complainant's idea as property, it is also incapable of giving him the remedy of account on another ground. The charge of the bill is that Ryan should account for complainant's share of any profits reaped by him from, or in connection with, the promotion and exploitation of the United Lead Company. Now, what profits could the defendant reap therefrom? The suggestion is that he might reap the profits of a promoter. A promoter may sometimes get shares not issued for money or property purchased. Such shares, viewed from a legal standpoint, are not of much value. But he may also get, by contract, fully-paid shares. It is presumably of such shares that the complainant desires an account. Now, on what basis could there be an equitable division of such shares? The complainant charges that it was part of his plan, personally, to contribute up to $200,000 if necessary. He has, in fact, contributed nothing. The plan contemplated the raising of $15,000,000. Ryan's interest in the company would depend in part upon the extent to which he had himself contributed, in part upon other considerations having no relation to complainant. This being so, it would seem to be utterly impossible, on any recognized basis of apportionment, to take from Ryan a part of his shares and give them to complainant. Complainant no doubt expected to secure shares, partly in return for the money to be put in by him and for the services to be performed by him, and partly for the prior work done in formulating the scheme. How much his collaborators in the undertaking, had they taken him in, would have allowed him for what he had done or would do is altogether conjectual. It would naturally have been a matter of express contract. I am quite unable to see how a court of equity could make him an allowance by way of account of profits, based

upon a condition of affairs wholly unanticipated and wholly unprovided for. Manifestly the only way of compensating him on any rational basis would be to ascertain what his plan was reasonably worth, and then to give him damages. This, of course, would presuppose a property right in the plan. Conceding such right, the damages, if recoverable at all, would be recoverable in a court of law in an action on the case, and not in equity.

I think the complainant's bill should be dismissed.

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## WHEATON v. PETERS.

(United States Supreme Court, 1834, 8 Peters 591.)

McLean, J. . . . "The complainants charge that the defendants have lately published and sold, or caused to be sold, a volume called 'Condensed Reports of Cases in the Supreme Court of the United States,' containing the whole series of the decisions of the court from its organization to the commencement of Peter's Reports at January term, 1827. That this volume contains, without any material abbreviation or alteration, all the reports of cases in the said first volume of Wheaton's Reports, and that the publication and sale thereof is a direct violation of the complainant's rights, and an injunction, etc., is prayed. . . .

The complainants assert their right on two grounds.

First, under the common law.

Secondly, under the acts of congress.

And they insist, in the first place, that an author was entitled, at common law, to a perpetual property in the copy of his works, and in the profits of their publication; and to recover damages for its injury, by an action on the case, and to the protection of a court of equity. . . .

That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy, endeavors to realize a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

The argument that a literary man is as much entitled to the product of his labor as any other member of society, cannot be controverted. And the answer is, that he realizes this product by the transfer of his manuscripts, or in the sale of his works when first published.

A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book, that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?

In what respect does the right of an author differ from that of an dividual who has invented a most useful and valuable machine? In the production of this, his mind has been as intensely engaged, as long, and, perhaps, as usefully to the public, as any distinguished author in the composition of his book.

The result of their labors may be equally benefical to society, and in their respective spheres they may be alike distinguished for mental vigor. Does the common law give a perpetual right to the author, and withhold it from the inventor? And yet it has never been pretended that the latter could hold, by the common law, any property in his invention, after he shall have sold it publicly.

It would seem, therefore, that the existence of a principle may well be doubted, which operates so unequally. This is not a characteristic of the common law. It is said to be founded on principles of justice, and that all its rules must conform to sound reason.

Does not the man who imitates the machine profit as much by the labor of another, as he who imitates or republishes a book? Can there be a difference between the types and press with which one is formed, and the instruments used in the construction of the others?

That every man is entitled to the fruits of his own labor must be admitted; but he can enjoy them only except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general. . . .

It may be proper to remark that the court are unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right. . . .

## BETTS v. DE VITRE.

(In Chancery, 1864, 34 L. J. Ch. 289.)

In this case a bill had been filed, by William Betts, against "Wimshurst's Patent Metal Foil and Sheet Metal Company (Limited)," and the directors and managers of the company, by which it was alleged that the defendants were infringing certain letters patent that had been taken out by the plaintiff, and that by reason of the infringement of the plaintiff's letters patent the plaintiff had sustained and was sustaining a great loss and injury, and had been and still was thereby deprived of large gains and profits which he would otherwise have made and obtained by working his patent. . . .

The plaintiff asked for damages and that the decree should direct an account of all profits of which the plaintiff had been deprived by reason of such infringement of his patent, as the profits made by the defendants could be no measure of the damages inflicted on the plaintiff. The plaintiff had not been in the habit of granting licenses, but had worked the patent himself. His Honour desired to hear the arguments of counsel on the point; and the case now came on to be heard on this question. . . .

Wood, V. C. I confess it appears to me that, if the damages are to be assessed, it would be proper to take the identical course that was taken in Hills v. Evans, for this reason, that damages of this description, namely, damages for the infringement of a patent where there has been no license granted at any time for the use of that patent, can only be ascertained on those very vague and guess-like data which it appears juries have been obliged to act upon in ascertaining what the actual loss has been that has occurred to a patentee by the user by some wrong-doer of his patent right. [His Honour then commented at some length on the practice at law with regard to the assessment of damages in patent cases, and continued]—The difficulty, one sees, must be very great where there are no licenses existing. Where there are licenses existing, the difficulty would be next to nothing, because you would simply ascertain the amount sold, and fix the wrongdoer with that amount.

As regards the jurisdiction of the court, I do not entertain any doubt that, since the passing of the act of 1858, the court has jurisdiction; because the act of 1858 was passed for the express purpose of enabling this court to render complete justice, without sending the parties to another tribunal, leaving it open, however, to the court either to take the course of assessing damages, or to leave it to a court of law, it being felt, no doubt, that in many cases a jury would be the more proper tribunal. Under the act of 1862 it is equally proper (if one may say so), when it is only a question of what is the legal conclusion to be come to upon such facts as may be before the court to say the court is not authorized any longer to avail itself of the assistance of a court of law, but is bound to determine all the points of law, because the court is competent to decide such points without the assistance of another tribunal. As the case stood before the act of 1858, no doubt the remedy was simply that which Mr. Rolt has described. You obtained an injunction and an account of profits, and if any one came here for relief, that was the only relief given. This court never granted damages, and before the act of 1858, I apprehend, could never grant damages in respect of the infringement of a patent right. After the passing of this act of 1858, which enacted by the 2nd section, that in all cases seeking for an injunction against the commission or continuance of any wrongful act, the court may award damages to the party injured, either in addition to or in substitution for the injunction. The exact course was followed by the Lord Chancellor, in a case of obstruction to lights; and though it is quite true that in the case of interference with ancient lights there was not the specific remedy, which the court has here provided, of taking an account of profits, yet when you find that the legislature, in 1858, has said that in all these cases for injunction against wrongful acts, you shall have the power of granting damages, it does not appear to me to exclude the case where the court had the power of giving some other form of remedy if it thought fit. Therefore if a case came before me, in which there was a simple and plain case, namely, a case of licenses having been granted, and a fixed and definite royalty, so that the accounts would be a matter of the utmost simplicity, I should feel that the court was doing that which was plainly not within the view of the statute if it sent the parties to law to ascertain that which it had the means in its own hands of ascertaining under the

2nd section of the act. But in this case, I see the greatest imaginable difficulty in arriving at these damages. Mr. Betts is content to leave it to the court to say what the principle should be on which the court should proceed; but I have not heard that the defendants are willing to do anything of the kind, and one sees the extreme difficulty that might arise in a case of this kind, and the best way of pointing out that difficulty is, that the cases are extremely few, even at law, of ascertaining damages; the case has been generally a trial of the patent right, and when that has been determined the parties have settled the matter as they best could.

I think the proper course is to give the plaintiff an injunction, with the usual account of profits, and if he chooses to waive that account, then let him be at liberty to proceed at law for damages. I am following the direct precedent of the Lord Chancellor in Hills v. Evans, which was decided after the passing of the act, and, as far as I can see on the same ground, namely, the extreme difficulty the court has in seeing its way to assess damages. . . .

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## CONTINENTAL PAPER BAG CO. v. EASTERN PAPER BAG CO.

(United States Circuit Court of Appeals, 1906, 150 Fed. 741.)

Lowell, C. J. This is a bill in equity to restrain the infringement of letters patent No. 558,969, issued to Liddell for an improvement in paper bag machines. . . .

The machine of the patent in suit is mechanically operative, as was shown experimentally for the purposes of this suit, but it has not been put into commercial use. No reason for the nonuser appears in the evidence, so far as we can discover. The defendant's machine has been an assured commercial success for some years. It was suggested at the oral argument that an unused patent is not entitled to the protection given by the extraordinary remedy of an injunction. This contention was not made in the defendant's printed brief. While this question has not been directly passed upon, so far as we are informed, in any considered decision of the Supreme Court, yet the weight of authority is in favor of the complainant. Fuller v. Berger, 120 Fed. 274, 56 C. C. A. 588, 65 L. R. A. 381. . . .

As we find the claims in suit to be valid and to have been infringed by the defendant, the complainant is entitled to an injunction, and the decree of the Circuit Court must be affirmed. . . .

Aldrich, D. J. (dissenting). I agree to the conclusion that the patent in suit was infringed, but, notwithstanding infringement, I contend that injunction relief should not be granted because it is an infringement of a paper patent deliberately held in nonuse for a wrongful purpose.

The injunction is not asked against the use of a machine which infringes one which the plaintiff below is making and vending under a patent, but against the use of a machine which infringes a patent under which the plaintiff is not making and vending, and one which the plaintiff intends to withhold from the public.

The manifest purpose is to withhold the infringed device from commercial use with the view of forcing another into the paper bag industry; and thus the concrete question is whether equity by injunction will aid such a purpose with respect to a legal right.

There is no pretense in this case that equitable aid is asked to protect from infringement the patent the plaintiff is using in its business. In the aspect most favorable to the plaintiff, the relief sought is injunction protection to a business or an industry built up in using a particular invention, and through acquiring and holding in deliberate nonuse a competing invention by way of protection.

It results, therefore, that a court of equity is asked not to protect from infringement the statutorily intended monopoly of the right to make, use, and vend under a particular patent, but to protect a monopoly beyond and broader than that, a monopoly in aid of the rightful statutory monopoly of the patent in use. The proposition involves the idea of a secondary monopoly maintained to stifle patent competition in the trades and industries, and thus contemplates a condition which at once contravenes the manifest purpose of the Constitution, and a monopoly of a kind and breadth and for a purpose in no sense ever contemplated by the statutory contract which safeguards the legal right to make, use, and vend under a particular patent.

My contention is not that an individual or a corporation may not buy and hold competing patents and control them in a strictly legal sense, and recover such damages at law for infringement as the rules of law accord to the owner for the invasion of such a legal right,

but that equity should not by the arm of injunction aid the owner in a purpose to control and suppress invention and to retard intended benefits which in the ordinary course of manufacture and trade, uninfluenced by unconscionable and inequitable control, would naturally flow in trade and commerce.

The legal right of ownership and right of legal control of patent rights is not at all denied; but why should equity through injunction help a man or a corporation to so unreasonably exercise the legal right as to effectuate the withdrawal of patents from their position in the field of utility, to the end that a single and perhaps an inferior right or monopoly shall be exclusively forced into business and upon the public, for the pecuniary gain of private ownership at the expense of the public? The primary purpose of the framers of the Constitution was not unconscionable private pecuniary gain, but to encourage invention in the interests of general business and of the public, and the act of Congress which followed soon after was to protect the right to make, use, and vend, under a given patent, thus stimulating invention in the public interest, and there was no thought of giving countenance to the idea of acquiring and locking up inventions, and improvements upon inventions, to the end that the general benefits of invention should be turned back; and the idea that a court of equity should help to accomplish such a result is contrary to the spirit of equity, and offends public policy.

Equity may look to the object of litigation and to the object of the relief sought, and thus, as already said, it is found that the primary and substantial object of the litigation here is not to protect the paper patent in suit, which is locked in nonuse, but to aid the patent monopoly of another patent which is not in suit, one which is in use, but not infringed—all to the real and manifest end that patent competition shall be stifled and destroyed, and that the business public engaged in the paper-bag industry shall be driven to the use of a particular patent machine not covered by the patent in litigation and one not infringed.

Simple nonuse is one thing. Standing alone, nonuse is no efficient reason for withholding injunction. There are many reasons for nonuse which, upon explanation, are cogent, but when acquiring, holding, and nonuse are only explainable upon the hypothesis of a purpose to abnormally force trade into unnatural channels—a hypothesis involving an attitude which offends public policy, the con-

science of equity, and the very spirit and intention of the law upon which the legal right is founded—it is quite another thing. This is an aspect which has not been considered in a case like the one here.

One may suppress his own. This is unquestionably decided, but when the suppression is for a wrongful purpose a taint is created, and a court of equity may look beyond the fictitious issue, in respect to protection of a paper patent which is locked up, and to the underlying and substantial issue, which involves the question whether equity will help a monopolistic exclusion of a beneficial right from public use, when the purpose is to force another and a different thing upon the public, under conditions which at once overturn the whole theory of government protection of patents intended to stimulate invention, to the end that the benefits of discovery shall, under reasonable competitive patent conditions, flow to the trades and industries.

Extreme illustrations may be used to test the reasonableness of a legal or an equitable proposition. If it is legal and equitable for individuals or corporations to buy and suppress one patent for the purpose of forcing another into trade and into control in a given industry, they may upon the same legal and equitable logic buy and suppress all, together with the public interest, and it is when the real and substantial purpose is not to safeguard a particular right, but to suppress it under the forms of law and to arbitrarily force another, that the equitable situation changes.

Under the Constitution and the statute in aid of the constitutional provision with reference to inventions and discoveries, it was intended to stimulate art and invention under competitive conditions by protecting the right to each inventor, or each owner to make use, and vend, and, if equity is to aid in stultifying this plain intent through affirmative relief by injunction, by protecting patent aggregations held in deliberate nonuse for the purpose of excluding all patent benefits except such as the holder sees fit to bestow, it will help to overthrow the intended meritorious patent competition under normal conditions in trade, and will help to deny the intended benefits to the public.

In the case at bar the patent in suit is deliberately suppressed. There has been no attempt to put it into commercial use. It relates to the very important and far-reaching paper bag industry. The only machine ever made under the patent was one made at an expense of many thousand dollars for use as an exhibit in this litigation. * * *

Reasonable considerations of wise public policy, and of principles governing equitable jurisprudence, require that equitable aid, through the discretionary arm of injunction, should be withheld from one who attempts to unreasonably and inequitably oppress the general public, and to so use a naked legal right, which inheres in a situation involving a government purpose, and into which the public right in a sense enters, as to offend and wholly reverse the plain spirit and policy of the fundamental law upon which the right is founded.

Justification of noninjunction intervention under such circumstances invokes no novel doctrine. Noninterference under such conditions is based upon fundamental and substantial grounds of justice and equity. Artificial statutory rights, existing in deliberate nonuse for purposes of control and to dominate business, with the legal right aided by equitable injunction, would at once become a thing altogether intolerable and indefensible. . . .

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## WALCOT v. WALKER.

(In Chancery, 1802, 7 Ves. 1.)

The bill prayed an injunction to restrain the defendants, who were booksellers, from publishing two editions of the plaintiff's works; upon a dispute as to the construction of the agreement between the parties.

The defendants by their answer admitted, that they had published in one of these editions some of the plaintiff's works, which they were not authorized to publish. As to that edition, therefore, they submitted . . .

LORD CHANCELLOR ELDON. If the doctrine of Lord Chief Justice Eyre, (Dr. Priestley's Case, see 2 Mer. 473), is right, and I think it is, that publications may be of such a nature, that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer, to decree either an injunction or an account of the profits of works of such a nature, that the author can maintain no action at law for the invasion of that, which he calls his property, but which the policy of the law will not permit him to consider his property. It is no answer, that the defendants are

as criminal. It is the duty of the court to know, whether an action at law would lie; for, if not, the court ought not to give an account of the unhallowed profits of libellous publications. At present I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not. As to one of these editions, it is not possible to grant the injunction, until the right of the plaintiff has been tried in an action. The facts may alter the effect of the agreement at law; and that must be looked to as to the right in equity. It is not immaterial also, that they have been permitted to publish in their trade for six years together without an action. But, even as to the other edition, before I uphold any injunction, I will see these publications, and determine upon the nature of them; whether there is question enough to send to law as to the property in those copies; for, if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to law.

Therefore let the injunction be dissolved as to the octavo edition; with liberty to apply for an injunction, in case the plaintiff succeeds in an action. As to the duodecimo edition, dissolve the injunction, unless in a week they bring the books into court.

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## SECTION VIII. INTERFERENCE WITH TRADE INTERESTS —FRAUD.

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### TABOR v. HOFFMAN.

(New York Court of Appeals, 1889, 118 N. Y. 30, 23 N. E. 12.)

The object of this action was to restrain the defendant from using certain patterns alleged to have been surreptitiously copied from patterns belonging to the plaintiff that had not been made public.

The trial court found that the plaintiff, having invented a pump known as "Tabor's Rotary Pump," which was patented, made a complete set of patterns to manufacture the same; that he necessarily spent much time, labor and money in making and perfecting such

patterns, which were always in his exclusive possession; that from time to time he made improvements upon the pump and incorporated the same in the patterns, which were never thrown on the market nor given to the public; that one Francis Walz, after the patents had expired, surreptitiously made for the defendant a duplicate set of said patterns from measurements taken from the patterns of the plaintiff, without his knowledge or consent while they were in the possession of said Walz to be repaired; that before the commencement of this action the defendant, with knowledge of all these facts and without the consent of the plaintiff, had commenced to make and since then has made pumps from said patterns, thus obtained; that the plaintiff has established a large and profitable trade in said pumps which "will be injured and the plaintiff damaged, if the defendant is permitted" to continue to manufacture from said patterns. . . .

Vann, J. It is conceded by the appellant that, independent of copyright or letters patent, an inventor or author, has, by the common law, an exclusive property in his invention or composition, until by publication it becomes the property of the general public. This concession seems to be well founded and to be sustained by authority. (Palmer v. DeWitt, 47 N. Y. 532; Potter v. McPherson 21 Hun, 559; Hammer v. Barnes, 26 How. Pr. 174; Kiernan v. M. Q. Tel. Co. 50 id. 194; Woolsey v. Judd, 4 Duer, 379; Peabody v. Norfolk, 98 Mass. 452; Salomon v. Hertz, 40 N. J. Eq. Rep. 400; Phillips on Patents, 333-341; Drone on Copyright, 97-139.)

As the plaintiff had placed the perfected pump upon the market, without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein. (Rees v. Peltzer, 75 Ill. 475; Clemens v. Balford, 14 Fed. Rep. 728; Short's Laws of Literature, 48).

But the completed pump was not his only invention, for he had also discovered means, or machines in the form of patterns, which greatly aided, if they were not indispensable, in the manufacture of the pumps. This discovery he had not intentionally published, but had kept it secret, unless by disclosing the invention of the pump, he had also disclosed the invention of the patterns by which the pump was made. The precise question, therefore, presented by this appeal, as it appears to us, is whether there is a secret in the patterns that yet remains a secret, although the pump has been given to the

world? The pump consists of many different pieces, the most of which are made by running melted brass or iron in a mold. The mold is formed by the use of patterns which exceed in number the separate parts of the pump, as some of them are divided into several sections. The different pieces out of which the pump is made are not of the same size as the corresponding patterns, owing to the shrinkage of the metal in cooling. In constructing patterns it is necessary to make allowances, not only for the shrinkage, which is greater in brass than in iron, but also for the expansion of the completed casting under different conditions of heat and cold, so that the different parts of the pump will properly fit together and adapt themselves by nicely balanced expansion and contraction to pumping either hot or cold liquids. If the patterns were of the same size as the corresponding portions of the pump, the castings made therefrom would neither fit together, nor if fitted, work properly when pumping fluids varying in temperature. The size of the patterns cannot be discovered by merely using the different sections of the pump, but various changes must be made and those changes can only be ascertained by a series of experiments, involving the expenditure of both time and money. Are not the size and shape of the patterns, therefore a secret which the plaintiff has not published and in which he still has exclusive property? Can it be truthfully said that this secret can be learned from the pump when experiments must be added to what can be learned from the pump before a pattern of the proper size can be made? As more could be learned by measuring the patterns, than could be learned by measuring the component parts of the pump, was there not a secret that belonged to the discoverer, until he abandoned it by publication, or it was fairly discovered by another?

If a valuable medicine, not protected by patent, is put upon the market, anyone may, if he can by chemical analysis and a series of experiments, or by any other use of the medicine itself aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in course of his employment had aided in compounding the medicine, and had thus become familiar with the formula.

The courts have frequently restrained persons, who have learned a secret formula for compounding medicines, beverages and the like while in the employment of the proprietor, from using it themselves or imparting it to others to his injury, thus in effect holding, as was said by the learned General Term, "That the sale of the compounded article to the world was not a publication of the formula or device used in its manufacture." (Hammer v. Barnes, supra; Morison v. Moat, 21 L. J. (N. S. 248; S. C. 20 id., 513; Green v. Folgham, 1 Sim. & Stu. 398; Yovatt v. Winyard, 1 Jac. & Walk. 394; Peabody v. Norfolk, supra; Salomon v. Hertz, supra; Kerr on Injunctions, 181; High on Injunctions, § 663).

The fact that one secret can be discovered more easily than another, does not affect the principle. Even if resort to the patterns of the plaintiff was more of a convenience than a necessity, still if there was a secret, it belonged to him, and the defendant had no right to obtain it by unfair means, or to use it after it was thus obtained. We think that the patterns were a secret device that was not disclosed by the publication of the pump, and that the plaintiff was entitled to the preventive remedies of the court. While the defendant could lawfully copy the pump, because it had been published to the world, he could not lawfully copy the patterns because they had not been published, but were still, in every sense, the property of the plaintiff, but also the discovery which they embodied.

The judgment should be affirmed, with costs.

Follett, Ch. J. dissenting. An inventor of a new and useful improvement has a right to its exclusive enjoyment, which right he may protect by a patent or by concealment. The plaintiff's patent had expired and all of the parts of the pump represented by the patterns had been for a long time on sale in the form of a completed pump. The patent on the original invention having expired and the plaintiff having voluntarily made the subsequent improvements public by selling the improved article, he lost his right to their exclusive use. The plaintiff's counsel concedes this; but says that while patterns could be made from the several parts of the pump, from which pumps like those made and sold by the plaintiff could be produced, that it was more difficult to make patterns from sections of the pump than from the patterns. This was so found by the court and cannot be gainsaid. The invention was not the patterns but the idea represented

by them, to which the plaintiff had lost his exclusive right. Neither the defendant nor the man who made the patterns sustained any relation by contract with the plaintiff. They were neither the servants nor partners of the plaintiff, and they owed him no duty not owed by the whole world. The act, at most, was a trespass and the plaintiff made no case for equitable relief. It is neither asserted nor found that the defendant is unable to respond in damages. The cases cited to sustain the judgment arose out of the relation of master and servant or between partners, and in all of them the idea had not been disclosed to the public, but had been kept secret by the inventor.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur with Vann, J., except Follett, Ch. J., dissenting, and Bradley and Haight, J. J., not sitting.

Judgment affirmed.

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## REGIS v. JAYNES & CO.

(Supreme Court of Massachusetts, 1904, 185 Mass. 458, 460, 70 N. E. 480.)

Bill in equity filed June 12, 1903, to restrain the defendants from using the word "Rex," or the word "Rexall" alone or with other words in connection with the manufacture and sale of dyspepsia tablets.

Bradley, J. When the plaintiff, Ellen M. Regis, first compounded her preparation in the form of pills she marked on the boxes in which they were sold the word "Rex," from which her family surname was derived. She not only adopted and attached it as the distinctive feature indicative of the origin, identity and proprietorship of her cure for dyspepsia, but filed it as a trade mark under St. 1895, c. 462, § 1. No evidence appears that at any time she has abandoned or ceased to use it, but the contrary is true. She has formed a partnership with her son, and from small sales in its original form and within a circumscribed territory other and more attractive combinations have been made, and the business has slowly increased in value and extended into larger fields. This is enough in the present case to establish an exclusive right of property in the plaintiffs to the device or name used in their business. Burt v. Tucker, 178 Mass. 493.

Lawrence Manuf. Co. v. Tennessee Manuf. Co. 138 U. S. 537.

It may be conceded that words which are merely descriptive of the style and quality of an article cannot be appropriated and used for this purpose by the manufacturer in the description of his wares to the exclusion of a similar use by others; but any words or devices that have for their principal object to make plain the identity of the owner with specific goods prepared and sold by him are not so classed, but may constitute a valid trade mark. Lawrence Manuf. Co. v. Lowell Hosiery Mills, 129 Mass. 325, 327; Frank v. Sleeper, 150 Mass. 583; Samuels v. Spitzer, 177 Mass. 226; Lawrence Manuf. Co. v. Tennessee Manuf. Co. ubi supra; Columbia Mill Co. v. Alcorn, 150 U. S. 460.

Although the subsequent origin of the mark or name used by the defendants on their cure for dyspepsia is not stated, it is found that it was not originally intended as an imitation of that of the plaintiffs, but may be considered as a fanciful term invented by the United Drug Company, and which was used to denote a particular proprietary medical compound put up and sold by it or its licensees.

But if no intention to wrongfully injure the plaintiffs is manifested in the origin of "Rexall," this does not constitute a defense where priority of ownership and continuous use is shown of the device or mark of which it is found to be an imitation, and buyers are likely from the resemblance to be misled and purchase the defendants' cure when they desire to buy and believe they are getting the remedy made by the plaintiffs. Gilman v. Hunnewell 122 Mass. 139; Burt v. Tucker, ubi supra; North Chesire & Manchester Brewery Co. v. Manchester Brewery Co. [1899] A. C. 83.

A mere comparison of the different words, devices or designs which may be used for the purpose of a trade mark is not enough to make out the main fact to be proved, but the plaintiffs must go further and establish the essential proposition on which a case like this depends, that taking all the circumstances, the form of manufacture, names, labels, shape of boxes or receptacles in which they are sold, there exists a reasonable probability that purchasers using ordinary care will be deceived by the similarity of names and led into mistaking one medicine for the other. McLean v. Fleming, 96 U. S. 245.

Among the various findings and rulings made by the master, the only one now material is that in which he decides this principal issue

of fact, and to which the single exception argued by the defendants was taken.

An examination of the report shows that the remedies are compounded in the form of two kinds of tablets, to be taken in connection with each other, and in this respect there was a likeness between them, though the boxes used for each in form and the labels attached are so dissimilar that persons of ordinary intelligence, if no further resemblance was found, could easily distinguish them, yet upon the whole, in connection with the similarity of names, the similitude becomes such that purchasers not familiar with the exact appearance of each, and the boxes and labels with which they are sold, and exercising the care and observation of the average buyer, are likely to mistake the defendants' preparation for that of the plaintiffs.

This finding is well supported by the evidence and subsidiary findings stated in the report, and under our rule where all the evidence is not reported, therefore bcomes final and is not to be disturbed. East Tennessee Land Co. v. Leeson, 183 Mass. 37, 38.

But the master further determined that within a common territorial area, the United Drug Company, with the knowledge and consent of the defendants who are represented in the advertisements as sole agents for its sale, has advertised, while the defendants to a very limited extent have sold, this medicine as a specific for the same disease, but it did not affirmatively appear that such competition in trade at the time the bill was filed had led to any actual injury to the business of the plaintiffs, and for this reason he declined to assess damages. Presumably their prompt action, which did not allow sufficient time to pass before suit to ascertain the effect on their trade, had, to a very large degree, forestalled results which they feared might follow from, and probably would have been caused by, the unauthorized acts of the defendants.

If at common law an action for damages caused to a manufacturer whose goods were put upon the market under a trade mark and had acquired a distinctive value and reputation, could be maintained against another trader who fraudulently copies and places on the goods made by him a similar mark or label, in equity, relief can be granted not only as to damages already suffered, but an injunction can be awarded restraining such unlawful use in the future. Thomson v. Winchester, 19 Pick. 214; Marsh v. Billings, 7 Cush. 322, 332; Lawrence Manuf.

Co. v. Lowell Hosiery Mills, ubi supra; Holbrook v. Nesbitt, 163 Mass. 120.

If the choice of the trade device used by the defendants was innocent and not copied from the name used by the plaintiffs, yet it appears, and the master has found, that after notice given to them that their continued use of it was wrongful, because of the fact that it was an imitation of the plaintiffs' trade mark, they still allowed their names to appear in the same form of advertisement, and continued to sell their preparation without any change of name, shape or label. Such conduct of itself affords strong presumptive evidence of fraud. Orr v. Johnston, 13 Ch. D. 434. And their acts from that time at least must be considered as a direct and intentional infringement. New England Awl & Needle Co. v. Marlborough Awl & Needle Co. 168 Mass. 154; American Waltham Watch Co. v. United States Watch Co. 173 Mass. 85; Flagg Manuf. Co. v. Holway, 178 Mass. 83; Viano v. Baccigalupo, 183 Mass. 160; Upmann v. Forester, 24 Ch. D. 231; Manhattan Medicine Co. v. Wood, 108 U. S. 218.

Although the master has decided that the plaintiffs have not yet suffered any monetary loss, equity interferes when title and successful imitation have been established to prevent the impairment or destruction of the right itself, notwithstanding it may also be found that the reputation and use of the plaintiffs' remedy may be confined to a relatively small section of the State when compared with the field occupied by the defendants, and probably is less widely known and sold, and much inferior to their specific in popularity. Such a disparity in volume of trade, or in reputation, if held to be decisive as a limitation of the extent to which relief should be granted, affords no opportunity ordinarily for the organization and development of a business, though founded on a valid trade mark, where from a small and feeble beginning, if not subjected to unlawful interference by rivals, it may become a large and profitable enterprise, which the owner has a right to foster and establish. For the injury suffered in such a case is the same in kind, though it may differ in degree. Shaver v. Shaver, 54 Iowa, 208, 210, 212.

While the public are deceived and buy the spurious production in the belief that the imitation is the original article, yet the jurisdiction to award an injunction may well rest on the ground, that where a substantial business has been built up, the output of which has become

known to buyers under a designated device or name, such designation, when lawfully established, whether treated technically as a trade mark or trade name, is property in the same sense as the instrumentalities which the owner uses in making the specific thing that he vends in the market in this form. So that the proprietor of such a trade product, if another without authority uses similar devices intending to represent by them that the goods are identical, is entitled to protection from this wrongful and fraudulent appropriation of his property. Weener v. Brayton, 152 Mass. 101; Bradley v. Norton, 33 Conn. 157; McLean v. Fleming, ubi supra; Hall v. Barrows, 32 L. J. Ch. (N. S.) 548, 551; Millington v. Fox, 3 Myl. & Cr. 338.

As the plaintiffs have made out a case, they are entitled to an injunction to prevent and restrain further interference with the use and enjoyment of their property, and the defendants' exception to the master's report must be overruled and the report confirmed.

Decree for the plaintiffs accordingly.

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## WORLD'S DISPENSARY MEDICAL ASSOCIATION v. PIERCE.

(New York Court of Appeals, 1911, 203 N. Y. 419, 96 N. E. 738.)

Collin, J. The action is to restrain unfair competition in the use of trade names.

The plaintiff was incorporated in 1879 under chapter 40 of the Laws of 1848 and the acts amendatory and supplemental thereto. The amendatory act, chapter 838 of the Laws of 1866, authorized an incorporation "for the purpose of carrying on any kind of manufacturing, mining, mechanical, chemical, agricultural, horticultural, medical or curative business." The object for which the plaintiff was incorporated were "the manufacturing, compounding and vending of medicines, consultation and operating in surgery, consultation and prescribing, furnishing and administering medicines and other curative and hygenic agents for invalids and furnishing care, attendants and home accommodations for the same." One Ray V. Pierce, a physician, transferred to the plaintiff upon its incorporation his business of manufacturing and selling under their trade names proprietary remedies

and conducting a private hospital and medical practice. The proprietary remedies which the plaintiff manufactures and sells are named "Dr. Pierce's Golden Medical Discovery," "Dr. Pierce's Favorite Prescription," "Dr. Pierce's Pleasant Purgative Pellets," "Dr. Pierce's Compound Extract of Smart Weed or Water Pepper," "Dr. Pierce's Lotion Tablets," "Dr. Pierce's Cough Syrup," "Dr. Pierce's Ammonio Camphorated Liniment," and "Dr. Pierce's Medicated Soap," which are commonly known to the public as "Dr. Pierce's Remedies" and also as "Pierce's Remedies." Ray V. Pierce has been at all times and is now the president and a director of the plaintiff and devised the formula for each remedy. The lotion tablets are sold in boxes, having upon their tops the words "Dr. Pierce's Purifying and Strengthening Lotion Tablets, World's Dispensary Medical Association, Props., Buffalo, N. Y.," and elsewhere the words "Dr. Pierce's Genuine Family Medicines," together with a facsimile signature of Ray V. Pierce, to wit: "R. V. Pierce, M. D." A part of the business of the plaintiff has been and is carrying on the hospital and medical practice founded by Ray V. Pierce. The plaintiff's remedies have become widely and favorably known and have an extensive sale throughout the United States and elsewhere.

The defendant since some time after 1899 has advertised and sold a certain proprietary remedy in the form of tablets under the name of "Dr. Pierce's Tansy, Cotton Root, Pennyroyal and Apiol Tablets," which are put up in boxes having on their tops the words "Dr. Pierce's Empress Brand Tansy, Cotton Root, Pennyroyal and Apiol Tablets," and elsewhere the words "Dr. Pierce's Empress Brand" and the words "the genuine has signature on box R. J. Pierce," the words "R. J. Pierce" being a facsmile signature. He is selling also another proprietary remedy known as "Pierce's Empress Brand Pennyroyal Tablets" in boxes having upon their tops those descriptive words and elsewhere the words "The Genuine has the signature on box R. J. Pierce," the words "R. J. Pierce" being a facsimile signature. The defendant is not a licensed physician, nor entitled to practice as such under the law of the state. The trial court found as facts that the use by defendant of the words "Dr. Pierce" is unlawful; that the names and labels used by defendant are calculated and designed to cause the public to believe that the defendant's remedies are manufactured and sold by plaintiff, and confusion between the business and remedies of the

parties will be created by their continued use; and as conclusions of law that the defendant in using the names designating his remedies is unfairly competing with the plaintiff, and that by a judgment the defendant be forever restrained from using in connection with his remedies those names or the words "Dr. Pierce" or "Dr. Pierce's," or any name which includes the word "Pierce" or "Pierce's" in such manner as to be calculated or designed to cause the purchasers of his remedies to believe them to be manufactured or sold by the plaintiff, or the word "Pierce" or "Pierce's" in connection with his business in such manner as to deceive or be calculated to deceive the public or the customers of either of the parties. The judgment of the Special Term was unanimously affirmed.

The principal contention of the defendant is that the plaintiff cannot lawfully practice medicine and conduct the hospital because it is a stock corporation (See People v. Woodbury Dermatological Institute, 192 N. Y. 454), and that the judgment protects its use of the trade name "Dr. Pierce" in its illegal practice, and, therefore, violates the rule that a plaintiff who does not come into a court of equity with clean hands is refused relief. (Prince Manfg. Co. v. Prince's Metallic Paint Co., 135 N. Y. 24; N. Y. & N. J. Lubricant Co. v. Young, 77 N. J. Eq. 321). A majority of the court do not think it necessary, under the findings of the trial court, to consider and decide whether or no the plaintiff is violating the law of the state by practicing medicine and conducting the hospital. They are of the opinion that even if it should be held that it is violating the law in this respect, it would not thereby be debarred from protection, otherwise proper, in respect of its manufacture and sale of proprietary remedies which are entirely separate from and in no manner connected with the practice of medicine. . . .

Appellant's contention that the judgment is too broad and drastic is well founded. Its restraint of the defendant from the use in any way of the designations "Dr. Pierce" or "Dr. Pierce's" is legal and just, because he is not a licensed physician nor entitled to practice under the law of the state. (Public Health Law, §§ 161, 174.) The defendant has, however, the right to use his own name in his own business. It is a general principle of law that one's name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property. (Chas. S. Higgins Co.

v. Higgins Soap Co., 144 N. Y. 462; Brown Chemical Co. v. Meyer, 139 U. S. 540.) It is, however, also a general principle of law that no man has the right to sell his products or goods as those of another. He may not through unfairness, artifice, misrepresentation or fraud injure the business of another or induce the public to believe his product is the product of that other. The law protects the honest dealer in the business which fairly is his, and the public from deception in trade. In this case, as in others which have been before the court, these principles must, because of the identity in the surname of the defendant and the trade name used by the plaintiff be reconciled and amalgamated. The plaintiff and its predecessor, Dr. Pierce, solely through a long period prior to 1899 associated the name Pierce with the proprietary remedies sold by it and which had acquired a high reputation and an extensive market. The name designates and causes the public to buy the remedies with which it is associated as those of the plaintiff. It when associated with the defendant's remedies is "calculated and designed to deceive and defraud the public, and the buyers and users of the plaintiff's proprietary remedies and tablets." The defendant has the right to use his name. The plaintiff has the right to have the defendant use it in such a way as will not injure his business or mislead the public. When there is such a conflict of rights, it is the duty of the court so to regulate the use of his name by the defendant that, due protection to the plaintiff being afforded, there will be as little injury to him as possible. Defendant should so use his name in connection with his remedies that he will obviate deception or with an explanation which will inform or be a notice to the public that those remedies are not those of plaintiff (Herring-Hall-Marvin Safe Co. v. Hall's Safe Company, 208 U. S. 554; Devlin v. Devlin, 69 N. Y. 212; Meneely v. Meneely, 62 N. Y. 427.)

We have already stated that the defendant cannot use his name with the prefix "Dr." We have concluded that due and adequate protection will be afforded to the plaintiff and the public if the defendant is enjoined additionally from using the words "Pierce" or "Pierce's" in advertising, describing, designating, labelling or selling his proprietary remedies unless said words be immediately preceded on the same line therewith by defendant's first or proper christian name and his middle name or the initial letter thereof in letters identical in size, color, style of type and conspicuousness with those of said

word so that said word shall not appear for any of the purposes aforesaid except when thus conjoined with the words "Robert J." or "Robert" followed by the middle name of the defendant. . . .

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## ROUTH v. WEBSTER.

(In Chancery, 1847, 10 Beav. 561.)

In 1846 a joint-stock company, called "The Economic Conveyance Company," was established, having for its object the carrying passengers by steamboat and omnibus at the average rate of 1d. a mile. The Defendants, the provisional Directors, had published prospectuses in which the name of the Plaintiff was used, without his authority, as a trustee of the Company. They also paid monies into the Bankers of the Company to the Plaintiff's account as trustee.

The Plaintiff, conceiving that he might be subjected to responsibility by the unauthorized use of his name, filed his bill against the Directors, and now moved for an injunction to restrain them from using his name in connection with the Company. . . .

THE MASTER OF THE ROLLS.

The sort of opposition made to the application to prevent the unauthorized use of the Plaintiff's name furnished a specimen of the anxiety of the Defendants to avoid unnecessary litigation.

I think that the Plaintiff is entitled to the injunction. I have no doubt that the Plaintiff never did consent to be a trustee. The Defendant Webster might have thought he did; if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee: his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorized act of the Defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can.

The defendants having published his name as a trustee, some negotiation took place for giving the Plaintiff an indemnity, and which he was willing to accept as a condition for his not applying for an injunction. This was not given, and then the matter remained as it

was before. He now moves for an injunction to prevent the Defendants proceeding in the same course for the future, and the Defendants' not pretending that they have a right to continue the use of his name, and disavowing any intention of doing so, nevertheless file affidavits in opposition to the application.

I am of opinion that the Plaintiff is entitled to the injunction; and, if it subjects the Defendants to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not.

Is not the Plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the Defendants, that they do not intend to repeat their misrepresentations; but I think the Plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this court.

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## SECTION IX. INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS

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### AMERICAN LAW BOOK CO. v. EDWARD THOMPSON CO.

(Supreme Court of New York, 1903, 41 N. Y. Misc. 396, 84 N. Y. Supp. 225.)

Bischoff, J. By preliminary injunction in an action for injunctive relief the plaintiff seeks to restrain the defendant from making agreements with subscribers to the plaintiff's encyclopedia, whereby the defendant undertakes to indemnify these subscribers against claims for damages for their breach of contract in declining to receive and pay for the plaintiff's books, and from conducting and defraying the expenses of the defense to any action brought against the subscriber

by the plaintiff. The complaint alleges that these agreements have been systematically offered by the defendant to the plaintiff's subscribers for the purpose of causing them to subscribe to the defendant's encyclopedia, and to repudiate their subscriptions for the work published by the plaintiff; and the allegations further disclose the making of intentional misrepresentations by the defendant to these subscribers as to the relative merits of the encyclopedias for the purpose of inducing the breach of contract. The defendant admits the making of the agreements in question, but asserts that the plaintiff has no remedy in equity upon the allegations of the complaint, the contention being that the plaintiff has his remedy at law for each contract broken, that the party to that contract has the right to break it and pay damages, and that what the party can do another person may ask him to do without restraint by injunction. It is also argued that the cases in which an injunction has been granted to prevent the solicitation of a breach of contract are found to have involved only contracts for personal services, and that there is no precedent for such an injunction as the plaintiff seeks. If there be no exact precedent for this injunction, none is needed. The complaint avers, and the affidavits support the averment, that the defendant is engaged in an attempt to obtain business which the plaintiff has secured, having no regard to fairness of competition but with resort to trick and device.

Whether the subscribers are in each instance actually led by the defendant's misrepresentations to break the particular contracts is not important, and is not an essential averment of the complaint. Intentional false statements, made with a view to obstruct the plaintiff's business and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition. The fraudulent intent, followed to fruition in the actual inducement of persons dealing with the plaintiff to break their contracts for the intended benefit of the defendant and to the intended injury of the plaintiff, is the basis of the defendant's wrong; a wrong which our system of remedial justice recognizes as the subject of relief. Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30; Rich v. R. R. Co., 87 N. Y. 390, and, see, Bowen v. Hall, 6 Q. B. D. 333.

That an action for damages would not afford an adequate remedy is obvious. The loss of business and the injury to business reputation

resulting from the defendant's act of obstruction, and from the consequent litigation between the plaintiff and its delinquent subscribers, could not be estimated nor proven with any degree of certainty for the purpose of a recovery; nor could the plaintiff properly estimate the additional burden of the future litigation with subscribers, whose defense would (as is to be inferred from the past) be conducted by the defendant at great pains and expense, bearing no relation to the amount of the claim, but solely in the interest of obstruction and for advertising purposes. The invasion of a legal right being apparent, and the inadequacy of relief at law being clear, a case for injunctive relief is made out; and, indeed, direct authority for an injunction upon a very similar state of facts is not wanting. Stoddard v. Key, 62 How. Prac. 137. . . .

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## HAMILTON BROWN SHOE CO. v. SAXEY.

(Supreme Court of Missouri, 1895, 131 Mo. 212, 32 S. W. 1106.)

Per Curiam: This is an appeal from the final judgment of the circuit court of the city of St. Louis, on a demurrer to the plaintiff's petition. . . .

The case was tried before the Hon. L. B. Valliant, one of the judges of that court, who on sustaining the demurrer delivered the following opinion:

"The amended petition states in substance that the plaintiff conducts a large shoe manufactory in this city and has in its employ some eight or nine hundred persons, all of whom are earning their living in plaintiff's employment, and are desirous of so continuing; that the defendants, except two of them, were lately in plaintiff's employ but have gone out of the same on a strike and are now, with the other two defendants, engaged in an attempt to force the other employees of plaintiff to quit their work and join in the strike, and that to accomplish this purpose they are intimidating them with threats of personal violence; that among the plaintiff's employees who are thus threatened are about three hundred women and girls and two or three hundred other young persons; that the effect of all this on the

plaintiff's business if the defendants are allowed to proceed would be to inflict incalculable damage.

"Upon filing this amended petition and the plaintiff's giving bond, as required by law, a temporary injunction issued restraining the defendants from attempting to force the plaintiff's employees to leave their work by intimidation and threats of violence, or from assembling for that purpose in the vicinity of plaintiff's factory.

"The defendants have appeared by their counsel and, by their demurred filed, admit that all the statements of the amended petition are true; but they take the position that even if they are doing the unlawful acts that they are charged with doing, still this court has no right to interfere with them, because they say that what they are doing is a crime by the state law of this state, and that for the commission of a crime they can only be tried by a jury in a court having criminal jurisdiction.

"It will be observed that the defendants do not claim to have the right to do what the injunction forbids them doing; their learned counsel even quotes the statute to show that it is a crime to do so; but he contends that the constitution of the United States and the constitution of the state of Missouri guarantee them the right to commit crime with only this limitation to wit: that they shall answer for the crime, when committed, in a criminal court, before a jury; and that to restrain them from committing crime is to rob them of their constitutional right of trial by jury.

"If that proposition be correct, then there can be no valid statute to prevent crime. But that position is contrary to all reason. The right of trial by jury does not arise until the party is accused of having already committed the crime. If you see a man advancing upon another with murderous demeanor and a deadly weapon, and you arrest him, disarm him, you have perhaps, prevented an act which would have brought about a trial by jury, but can you be said to have deprived him of his constitutional right of trial by jury? The train of thought put in motion by the argument of the learned counsel for defendants on this point leads only to this end, towit, that the constitution guarantees to every man the right to commit crime so that he may enjoy the inestimable right to trial by jury.

"Passing now to the question relating to the particular jurisdiction of a court of equity, we are brought to face the proposition that a

court of equity has no criminal jurisdiction, and will not interfere by injunction to prevent the commission of a crime. These two propositions are firmly established; and as to the first, that a court of equity has no criminal jurisdiction, there is no exception. As to the second, that a court of equity will not interfere by injunction to prevent the commission of a crime, that, too, is perhaps without exception when properly interpreted; but it is sometimes misinterpreted. When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual, a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case.

"On this question counsel have cited cases in which courts of equity have been denied jurisdiction to enjoin the publication of a libel, and in those opinions are to be found the general statement of the proposition above mentioned. But the law of libel is peculiar, and those cases turn upon that peculiarity. The freedom of the press has been so jealously guarded, both in England and in this country, that our law of libel is like no other law on the books. Our constitution provides that a man may say, write, and publish "whatever he will," being answerable only for the "abuse of liberty." Libel is the only act injurious to the rights of another which a man can not, under proper conditions, be restrained from committing; and that is so because the constitution says he shall be allowed to do it and answer for it afterwards.

"Equity will not interfere when there is an adequate remedy at law. But what remedy does the law afford that would be adequate to the plaintiff's injury? How would their damages be estimated? How compensated? The defendants' learned counsel cites us to the criminal statute, but how will that remedy the plaintiff's injury? A criminal prosecution does not propose to remedy a private wrong. And even if there was a statute giving a legal remedy to plaintiff, it would not

oust the equity jurisdiction. The legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy. What a humiliating thought it would be if these defendants were really attempting to do what the amended petition charges, and what their demurrer confesses, that is, to destroy the business of these plaintiffs, and to force the eight or nine hundred men, women, boys, and girls who are earning their livings in the plaintiff's employ, to quit their work against their will, and yet there is no law in the land to protect them!

"The injunction in this case does not hinder the defendants doing anything that they claim they have a right to do. They are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own. And they have a right to use fair persuasion to induce others to join them in their quitting. But when fair persuasion is exhausted they have no right to resort to force or threats of violence. The law will protect their freedom and their rights, but it will not permit them to destroy the freedom and rights of others. The same law which guarantees the defendants in their right to quit the employment of the plaintiffs at their own will and pleasure also guarantees the other employees the right to remain at their will and pleasure.

"These defendants are their own masters, but they are not the masters of the other employees, and not only are they not the masters of the other employees, but they are not even their guardians.

"There is a maxim of our law to the effect that one may exercise his own right as he pleases, provided that he does not thereby prevent another exercising his right as he pleases. The maxim, or rule of law, comes nearer than any other rule in our law to the golden rule of divine authority: 'That which you would have another do unto you, do you even so unto them.' Whilst the strict enforcement of the golden rule is beyond the mandate of a human tribunal, yet courts of equity, by injunction, do restrain men who are so disposed from so exercising their own rights as to destroy the rights of others.

"The demurrer to the amended petition is overruled."

The law applicable to the case is so clearly stated in this opinion of the learned judge, that to add anything to it would be a work of supererogation. We adopt it as the opinion of this court and affirm the judgment. All concur.

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## LOHSE PATENT DOOR CO. v. FUELLE.

(Supreme Court of Missouri, 1908, 215 Mo. 421, 114 S. W. 997.)

Woodson, J. This suit had its origin in the circuit court of the city of St. Louis, the object of which is to enjoin the defendants from declaring and prosecuting a boycott against the appellant and its business. . . .

In brief, the petition charges defendants and those with whom they are affiliated with having entered into a conspiracy or an unlawful combination to injure and damage plaintiff's business by having coerced and intimidated certain contractors and builders from purchasing and using all building materials manufactured by it in any building to be constructed by them by prohibiting their members from working upon all buildings in which plaintiff's said materials were being used. . . .

The word "boycott" has been defined by many courts, in different language, but all agree substantially as to the meaning of the word. After an extensive review of the authorities, the Supreme Court of Minnesota, in the recent case of Gray v. Building Trades Council, 91 Minn. 1. c. 179, defines the word in the following language: "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs. Such acts constitute a conspiracy, and may be restrained by injunction."

If that is the proper definition of the word boycott, then the petition clearly charges the defendant with being guilty of boycotting plaintiff's

business, for the reason, as before stated, the petition charged the defendants, with having formed a combination to injure plaintiff's business, by having caused the builders of the city of St. Louis, against their will, to withdraw from plaintiff their beneficial business intercourse through threats that unless a compliance with their demands be made, the defendants will cause a strike to be called against the said business.

All the authorities hold that a combination to injure or destroy the trade, business or occupation of another by threatening or producing injury to the trade, business or occupation of those who have business relations with him is an unlawful conspiracy, regardless of the name by which it is known, and may be restrained by injunction. . . .

During the oral argument it was suggested by counsel that the case of Clothing Co. v. Watson, 168 Mo. 146, announced views not in harmony with those expressed by the courts in the cases before cited. We do not so understand that case. By a careful reading of that case it will be seen that the question there discussed was whether or not under the Constitution defendant in that case could be enjoined from publishing a boycott, and it was there held that he could not be so enjoined, but that is not the purpose of this suit. The clear object of this case is to prohibit the defendants from continuing the boycott in force heretofore declared or to enjoin the defendants from declaring a threatened boycott against plaintiff's business, and not to enjoin its publication. If the boycott itself is enjoined, there would be no occasion for complaint against its publication.

Learned counsel for defendants, several times, during the course of the oral argument of this case, asked the question: If a single individual may lawfully do all of the things which are charged against the defendants, then why may not two or more persons agree to do the same things without violating the law?

The answer is plain and simple. Neither the individual nor two or more persons can lawfully conspire to do the things charged. In the first place, the individual cannot do the things charged in the petition at all, either legally or illegally, for the reason he cannot conspire with himself to injure plaintiff's business however well his intention may be to do so; nor can he intimidate the builders from using materials manufactured by plaintiff, for the reason he has no associates bound to him

by contract or otherwise with which to intimidate them. It is true, the individual might make up his mind to injure plaintiff's business and determine in his own mind that he would work such injuries by threatening to no longer work for the builders and contractors if they continued to use materials manufactured by the plaintiff; but the practical working of such an undertaking by an individual would result in most, if not in all, instances in such a small loss to the builders and contractors over and above the profit they would probably make by continuing to deal with plaintiff, that the threat would have but little or no intimidating effect upon them, and in no manner force them from doing business with plaintiff. Certainly the law would take no notice of such infinitesimal loss nor such slight intimidation. *Lex non curat de minimis.*

But so much cannot be said regarding combinations or conspiracies formed between two or more persons to injure and destroy the business of a person by means of a boycott.

The books are full of cases where such combinations or conspiracies have wrought great injury and loss, and even wrecked and destroyed great and powerful business institutions and, if left untrammeled, would cause the strongest of them to fall, and the very foundation of our government to crumble.

Such combinations are differentiated from the labor organizations mentioned in paragraph one of this opinion by the fact that they are formed for the direct purpose of protecting and promoting the interests of the laboring classes, which only indirectly and incidentally operate in restraint of trade; while these have for their direct object the immediate effect to injure and damage the business of the persons at whom they are directed, and thereby compel them to discharge the non-union laborers, and thereby indirectly and incidentally protect and benefit the parties to the combination or conspiracy.

All of the authorities permit and encourage the former organizations in carrying out their laudable purposes, but the law with an equally firm hand prohibits all combinations and conspiracies which are formed for the purpose of working injury and damage to the business of another.

We are, therefore, of the opinion that the trial court erred in sustaining the demurrer to the petition.

## CORNELLIER v. HAVERHILL SHOE MFRS. ASS'N.

(Supreme Court of Massachusetts, 1915, 221 Mass. 554, 109 N. E. 643.)

Bill in Equity, filed in the Supreme Judicial Court on January 25, 1913, against certain corporations and the members of certain partnerships engaged in the business of manufacturing shoes in Haverhill, to enjoin the defendants from interfering with the plaintiff's right to earn a livelihood, from the use of all black lists or other lists or devices containing the name of the plaintiff, for the assessment of damages and for further relief. . . .

DeCourcy, J. . . . The basis of the plaintiff's complaint is that the defendants conspired against him, and by means of a black list procured his discharge from employment. On December 12, 1912, the plaintiff, with thirty-nine other employees of the Witherell and Dobbins Company, went out on strike. He secured employment at the factory of Charles K. Fox, Inc., on December 14, began work on December 16, at 7:10 A. M., and was discharged in a summary and unusual manner about two hours later. The master finds that the cause of his discharge was the fact that he was one of the striking employees of the Witherell and Dobbins Company, and that there existed a tacit understanding, to which the Fox Company was a party, that those striking employees should not be employed. It appears that on the day of the strike, or the day after, and at the request of the defendant Child (who was the manager of the Shoe Manufacturers' Association), Mr. Dobbins brought to a meeting of the manufacturers several lists containing the names of the employees who had gone on strike. Copies of the list were prepared and circulated by the defendants for the purpose of preventing the strikers from getting work in Haverhill and vicinity, and of forcing them to abandon the strike and return to work at the Witherell and Dobbins Company's factory against their will. The acts of the several defendants in furtherance of this combination need not be recited. The master specifically has found that Cornellier was discharged at Fox's because of this "black list." It may be said in passing that of the twenty defendants named in the bill the master finds that only the following (herein referred to as the defendants) were responsible for the acts

complained of, namely, the Haverhill Shoe Manufacturers' Association, the Witherell and Dobbins Company, Gale Shoe Manufacturing Company, Charles K. Fox, Inc., Austin H. Perry, Ira J. Webster, Alwyn W. Greeley, Albert M. Child, George W. Dobbins and H. L. Webber.

Did this combination of the defendants to blacklist the striking employees of the Witherell and Dobbins Company, resulting in the discharge of and damage to the plaintiff, give him a legal cause of action? The statement of the general right of the Fox Company to terminate a workman's employment when and for what cause it chooses, where no right of contract is involved, does not carry us far. See Coppage v. Kansas, 236 U. S. 1. The same is true of the recognized equal rights of employers and employees to combine in associations or unions, so long as they employ lawful methods for the attainment of lawful purposes. See Hoban v. Dempsey, 217 Mass. 166. But it is settled that the intentional interference by even an individual, without lawful justification, with the plaintiff's right to have the benefit of his contract with his employer would be an actionable wrong. Berry v. Donovan, 188 Mass. 353. Hansan v. Innis, 211 Mass. 301. A combination to blacklist is the counter weapon to a combination to boycott and is open to similar legal objections, when directed against persons with whom those combining have no trade dispute, or when the concerted action coerces the individual members, by implied threats or otherwise, to withhold employment from those whom ordinarily they would employ. See New England Cement Gun Co. v. McGivern, 218 Mass. 198, and cases cited.

It is true that in Worthington v. Waring, 157 Mass. 421, this court refused to enjoin the defendants from making use of a black list, stating that the rights alleged to be violated were personal and not property rights, and that there were no approved precedents in equity for issuing an injunction against the grievance there complained of. In the light of more recent decisions of the court recognizing that the right to labor and to its protection from unlawful interference is a constitutional as well as a common law right there appears to be no sound reason why it should not be adequately protected under our present broad equity powers. As intimated in Burnham v. Dowd, 217 Mass. 351, 359, the case of Worthington v. Waring cannot well be reconciled with our later decision. It must

be considered as no longer binding as an authority for the doctrine that equity will afford no injunctive relief against an unlawful combination to blacklist. . . .

Assuming that, if this were an action at law, the plaintiff could recover for the damages caused by the unlawful combination of the defendants to blacklist him, the question remains whether he is entitled to prevail in the present suit. He has brought these proceedings in a court of equity. Under the established maxim that "he who comes into equity must come with clean hands," the court will not lend its active aid to him if he has been in equal wrong with the defendants touching the transaction as to which relief is sought, but will leave him to his remedy at law. The strike at the Witherell and Dobbins factory in which he joined is intimately connected with the black list of which he complains. The plaintiff individually was free, under his contract at will, to terminate his employment for any reason that he deemed sufficient. He had an undoubted right to join a labor organization. The employer as an individual had similar rights. But while each had a right to organize with others, it by no means follows that the organizations lawfully could do everything that the individual could do. See Martell v. White, 185 Mass. 255, 260; Pickett v. Walsh, 192 Mass. 572, 582. An act lawful in an individual may be the subject of civil conspiracy when done in concert, provided it is done with a direct intention to injure another, or when, although done to benefit the conspirators, its natural and necessary consequence is the prejudice of the public or the oppression of individuals. 5 R. C. L. 1093.

Without discussing the conflicting authorities in other jurisdictions, in this Commonwealth, in the present stage of the industrial controversy, the principle is defined that the legality of a strike depends first upon the purpose for which it is maintained, and secondly on the means employed in carrying it on. As to the first, it is no longer in question that organized labor lawfully may strike for higher wages, shorter hours, and improved shop conditions. Minasian v. Osborne 210 Mass. 250, and cases cited. On the other hand it has been decided that a strike instituted merely to compel a closed shop would not be justifiable on principles of competition, but would be unlawful. Reynolds v. Davis, 198 Mass. 294; Folsom v. Lewis, 208 Mass. 336. In the debatable ground between these extremes the con-

flict of rights must be adjusted as new conditions arise. And the question whether any particular strike is lawful is a question of law. DeMinico v. Craig, 207 Mass. 593; Burnham v. Down, 217 Mass. 351, 356. . . .

It is clear from the findings of the master, however, that the Witherell and Dobbins strike was conducted by unlawful means; that laws were violated and the well established rights of others invaded. On several occasions crowds of strikers paraded in front of the factory, cheering and shouting "Come out," and occasionally adding the names of men who remained at work; once at least one hundred or more paraded in front of the factory; two by two in one direction and two by two in the opposite direction, so that there were four persons abreast most of the time, and the operatives leaving the factory had difficulty in breaking through the line. Some of the employees were intimidated and followed by crowds, others had to be escorted home by police officers, and four or five were assaulted by strikers or their sympathizers because they took the place of striking employees. One serious attack, characterized by the master as cowardly and unprovoked, was made on an employee named Mills, as he was going home after dark at the conclusion of his day's work. And while the persons who committed the assaults were not identified, the union and its officials made no effort to stop or control them; and the union men who were present when Mills was assaulted and rendered unconscious made no effort to give any aid or to pursue the man who struck the blow. The strike was carried on in a manner that reasonably caused the average employee to be apprehensive for his personal safety. The plaintiff cannot avoid responsibility for some, at least, of these acts. The strike, which was pending for more than three months after the bill was filed (as well as the "general" strike), was maintained under the direction of the union to which he belonged, and for the recognition of which he went on strike. He took part in the picketing and in at least one of the parades, and otherwise aided and encouraged it. See Lawlor v. Loewe, 235 U. S. 522.

The conduct of the plaintiff and the acts of others with whom he was legally identified preclude him from obtaining the active aid of a court of equity. For any damage caused by the black list which the defendants maintained he must seek his redress, if any, at law. Accordingly it becomes unnecessary to consider the effect upon his rights

of his participation in the general strike of December 30, and the further questions, whether that strike was for a lawful or an unlawful purpose, and whether it was conducted by lawful or unlawful means.

For the reasons herein set forth a decree is to be entered overruling the exceptions, confirming the master's report, and dismissing the bill of complaint.

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## HAWARDEN v. THE YOUGHIOGHENY & LEHIGH COAL CO.

(Supreme Court of Wisconsin, 1901, 111 Wis. 545, 87 N. W. 472.)

WINSLOW, J. The first count of the complaint is claimed to state a cause of action at law to recover damages resulting from an unlawful conspiracy, and the second count a cause of action in equity on behalf of a class to restrain the further execution of the conspiracy, and both counts are challenged by demurrer for insufficiency of facts.

1. The gist of the first count is that the plaintiff was a retail coal dealer in the city of Superior; that the defendants, "the wholesalers," own practically all the coal docks at Superior and Duluth, and that a retailer cannot carry on his business at Superior unless he can buy of the wholesalers freely and without discrimination; that the wholesalers entered into a combination with the defendant retailers by which it was agreed that the wholesalers should sell coal to the defendant retailers, and to none others, for the purpose, among others, of forcing out of the retail trade all retailers not in the combination, and among others the plaintiff; that such agreement or conspiracy has been successful, and as a result thereof the plaintiff's business has been destroyed, to his damage. Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making greater gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that

the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of State ex rel. Durner v. Huegin, 110 Wis. 189, it was, in effect, repudiated. It is true that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice Marshall it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury to such other is actionable. "Where the act is lawful for an individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it."

These principles are decisive as to the first count in this complaint. The allegation is distinct and clear that one of the purposes and objects of this agreement was to drive the plaintiff out of business. This was an ulterior and unlawful purpose, and constitutes malice in contemplation of law. Therefore, under the allegations of the complaint, it is clear that the combination here formed was formed for the malicious purpose of doing an injury to another, and that such injury has resulted, and hence that a cause of action at law for damages is stated. . . .

In the second count the plaintiff attempts on behalf of a class of persons, namely, the retailers who were excluded from the combination, to obtain equitable relief by way of a perpetual injunction restrain-

ing the continuance of the operations of the conspiracy. That courts of equity have jurisdiction to restrain such conspiracies when irreparable injury will result and legal remedies will prove inadequate or a multiplicity of suits be necessary, seems to be well settled. Beck v. Railway T. P. Union, 118 Mich 498. That the conspiracy may be directed against a considerable number of persons as well as against one, cannot be doubted. We have, therefore, before us an unlawful conspiracy directed against a large number of persons, which has already resulted in driving out of business a considerable number of such persons, and which the defendants threaten to continue indefinitely against the whole class.

Plaintiff claims that this situation brings the case within that provision of the statute contained in sec. 2604, Stats, 1898, which declares, "when the question is one of common or general interest of many persons, . . . one or more may sue for the benefit of the whole." The question as to the legality of this conspiracy is certainly one of common and general interest to all persons against whom it was directed and is being enforced. The complaint alleges that there are many of such persons, and we are unable to perceive any fault in the plaintiff's contention. It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of George v. Benjamin, 100 Wis. 622, and Hodges v. Nalty, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed "very numerous" is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons. These conditions are satisfied here, and we conclude that the second count states a good cause of action in equity by the plaintiff on behalf of himself and a class composed of all other retail coal dealers in Superior similarly situated. . . .

## TUTTLE v. BUCK.

(Supreme Court of Minnesota, 1911, 107 Minn., 146, 119 N. W. 946.)

This appeal was from an order overruling a general demurrer to a complaint in which the plaintiff alleged:

That for more than ten years last past he has been and still is a barber by trade, and engaged in business as such in the village of Howard Lake, Minnesota, where he resides, owning and operating a shop for the purpose of his said trade. That until the injury hereinafter complained of his said business was prosperous, and plaintiff was enabled thereby to comfortably maintain himself and family out of the income and profits thereof, and also to save a considerable sum per annum, to wit, about $800. That the defendant, during the period of about twelve months last past, has wrongfully, unlawfully, and maliciously endeavored to destroy plaintiff's said business, and compel plaintiff to abandon the same. That to that end he has persisted and systematically sought, by false and malicious reports and accusations of and concerning the plaintiff, by personally soliciting and urging plaintiff's patrons no longer to employ plaintiff, by threats of his personal displeasure, and by various other unlawful means and devices, to induce, and has thereby induced, many of said patrons to withhold from plaintiff the employment by them formerly given. That defendant is possessed of large means, and is engaged in the business of a banker in said village of Howard Lake, at Dassel, Minnesota, and at divers other places, and is nowise interested in the occupation of a barber; yet in pursuance of the wicked, malicious, and unlawful purpose aforesaid, and for the sole and only purpose of injuring the trade of the plaintiff, and of accomplishing his purpose and threats of ruining the plaintiff's said business and driving him out of said village, the defendant fitted up and furnished a barber shop in said village for conducting the trade of barbering. That failing to induce any barber to occupy said shop on his own account, though offered at nominal rental, said defendant, with the wrongful and malicious purpose aforesaid, and not otherwise, has during the time herein stated hired two barbers in succession for a stated salary, paid by him, to occupy said shop, and to serve so many of plaintiff's patrons as said

defendant has been or may be able by the means aforesaid to divert from plaintiff's shop. That at the present time a barber so employed and paid by the defendant is occupying and nominally conducting the shop thus fitted and furnished by the defendant, without paying any rent therefor, and under an agreement with defendant whereby the income of said shop is required to be paid to defendant, and is so paid in partial return for his wages. That all of said things were and are done by defendant with the sole design of injuring the plaintiff, and of destroying his said business, and not for the purpose of serving any legitimate interest of his own. That by reason of the great wealth and prominence of the defendant, and the personal and financial influence consequent thereon, he has by the means aforesaid, and through other unlawful means and devices by him employed, materially injured the business of the plaintiff, has largely reduced the income and profits thereof, and intends and threatens to destroy the same altogether, to plaintiff's damage in the sum of $10,000. . . .

Elliot, J. . . . . For generations there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of the courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individual from the evils which result from unrestrained business competition. The problem has been to so adjust matters as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury to the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights, and applications of this idea are found in Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. 541, Id., 92 Minn. 230, 99 N. W.

882, and Barclay v. Abraham, 121 Iowa, 619, 96 N. W. 1080, 64 L. R. A. 255, 100 Am St. 365.

Many of the restrictions which should be recognized and enforced result from a tacit recognition of principles which are not often stated in the decisions in express terms. Sir Frederick Pollock notes that not many years ago it was difficult to find any definite authority for stating as a general proposition of English law that it is wrong to do a wilful wrong to one's neighbor without lawful justification or excuse. But neither is there any express authority for the general proposition that men must perform their contracts. Both principles, in this generality of form and conception, are modern and there was a time when neither was true. After developing the idea that law begins, not with authentic general principles, but with the enumeration of particular remedies, the learned writer continues: "If there exists, then, a positive duty to avoid harm, much more must there exist the negative duty of not doing wilful harm, subject, as all general duties must be subject, to the necessary exceptions. The three main heads of duty with which the law of torts is concerned, namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others, are all alike of a comprehensive nature." Pollock, Torts, (8th Ed.) p. 21. He then quotes with approval the statement of Lord Bowen that "at common law there was a cause of action whenever one person did damage to another, wilfully and intentionally, without just cause or excuse."

In Plant v. Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. 330, Mr. Justice Hammond said: "It is said also that, where one has the lawful right to do a thing, the motive by which he is actuated is immaterial. One form of this statement appears in the first headnote in Allen v. Flood, as reported in (1898) A. C. 1, as follows: 'An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.' If the meaning of this and similar expressions is that where a person has the lawful right to do a thing, irrespective of his motive, his motive is immaterial, the proposition is a mere truism. If, however, the meaning is that where a person if actuated by one kind of a motive has a lawful right to do a thing, the act is lawful when done under any conceivable motive, or that an act lawful under one set of circumstances is therefore lawful under every conceivable

set of circumstances, the proposition does not commend itself to us as either logically or legally accurate." . . .

It is freely conceded that there are many decisions contrary to this view; but, when carried to the extent contended for by the appellant, we think they are unsafe, unsound, and illy adapted to modern conditions. To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery.

Nevertheless, in the opinion of the writer this complaint is insufficient. It is not claimed that it states a cause of action for slander. No question of conspiracy or combination is involved. Stripped of the adjectives and the statement that what was done was for the sole purpose of injuring the plaintiff, and not for the purpose of serving a legitimate purpose of the defendant, the complaint states facts which in themselves amount only to an ordinary everyday business transaction. There is no allegation that the defendant was intentionally running the business at a financial loss to himself, or that after driving the plaintiff out of his business the defendant closed up or intended to close up his shop. From all that appears from the complaint he may have opened the barber shop, energetically sought business from his acquaintances and the customers of the plaintiff, and as a result of his enterprise and command of capital obtained it, with the result that the plaintiff, from want of capital, acquaintance, or enterprise, was unable to stand the competition and was thus driven out of business. The facts thus alleged do not, in my opinion, in themselves, without reference to the way in which they are characterized by the pleader, tend to show a malicious and wanton wrong to the plaintiff.

A majority of the justices, however, are of the opinion that, on the principle declared in the foregoing opinion, the complaint states a cause of action, and the order is therefore affirmed.

Affirmed.

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## SECTION X. DEFAMATION—INTERFERENCE WITH PRIVACY.

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### EMACK v. KANE.

(United States Circuit Court, 1888, 34 Fed. 46.)

BLODGETT, J. This is a bill in equity, in which the complainant seeks to restrain the defendant Kane from sending circulars injurious to the complainant's trade and business. Both complainant and defendants are manufacturers of what are known as "noiseless" or "muffled" slates for use of school children. . . . Since August 1, 1883, up to the filing of this bill, which was in March, 1884, the defendants have sent out to the trade,—that is, to the jobbers and persons engaged in this class of slates,—circulars threatening all who should buy from the complainant, or deal in his slates, with law-suits, upon the ground that complainant's slate is an infringement of the Goodrich patent as reissued. I do not intend to quote all these circulars, but extracts from a few will illustrate the character of the attacks which the defendants have made upon the complainant's business. In a circular issued September 26, 1882, and sent generally to the trade, occurs the following language:

"What do we propose to do with infringers? Nothing for the present, so far as prosecuting Emack is concerned, and for reasons that the trade well understand. We could stop him, of course, but he would open out the next day in another loft or basement, and under another name, and put us to the expense of another suit, and so on indefinitely. When we commence suit we want to be sure of damages. The language of the original patent was somewhat am-

biguous, and hence there was some excuse for those who sold it, believing that it was not an infringement. There can be no mistake now. The language of the claims could not be made plainer. Any dealer who now sells the Emack slate knows that he is selling an infringement of our patent, and we shall protect ourselves and our friends by holding all who are responsible for royalty and damages."

"To our friends: We will say that very few jobbers have handled the Emack slate. Failing to sell to the jobbing trades, he went to the leading retailers, and sold them all he could. They, of course, had heard nothing of our claims as to infringement, as we sell only to jobbers. We now know every man in the country who handles these slates, and shall notify them all promptly of the reissue of the patent. Then, if they continue to sell, we shall be forced to adopt legal measures." . . .

Many more extracts might be made from these circulars, which appear in the proof, but this is enough to show the spirit in which the defendant attempted to intimidate the complainant's customers from dealing with him, or dealing in the slates manufactured by him; and the proof shows abundantly that much business has been diverted from the complainant by these threats and circulars; that the complainant's business has been seriously injured, and his profits very much abridged by the course pursued in sending out these circulars. The proof in this case also satisfies me that these threats made by defendants were not made in good faith. The proof shows that defendants brought three suits against Emack's customers, for alleged infringement of the Goodrich patent by selling the Emack slates; that Emack assumed the defense in these cases, and, after the proofs were taken, and the suits ripe for hearing, the defendants voluntarily dismissed them,—the dismissals being entered under such circumstances as to fully show that the defendants knew that they could not sustain the suits upon their merits; that said suits were brought in a mere spirit of bravado or intimidation, and not with a *bona fide* intent to submit the question of infringement to a judicial decision.

The defense interposed is—First, that these circulars were mere friendly notices to the trade of the claims made by defendant as to what was covered by the Goodrich patent; second, that a court of equity has no jurisdiction to entertain a bill of this character, and

restrain a party from issuing circulars, even if they are injurious to the trade of another.

I cannot believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant, as shown by the proofs in this case. It shocks my sense of justice to say that a court of equity cannot restrain systematic and methodical outrages like this, by one man upon another's property rights. If a court of equity cannot restrain an attack like this upon a man's business, then the party is certainly remediless, because an action at law in most cases would do no good, and ruin would be accomplished before an adjudication would be reached. True, it may be said that the injured party has a remedy at law, but that might imply a multiplicity of suits which equity often interposes to relieve from; but the still more cogent reason seems to be that a court of equity can, by its writ of injunction, restrain a wrongdoer, and thus prevent injuries which could not be fully redressed by a verdict and judgment for damages at law. Redress for a mere personal slander or libel may perhaps properly be left to the courts of law, because no falsehood, however gross and malicious can wholly destroy a man's reputation with those who know him; but statements and charges intended to frighten away a man's customers, and intimidate them from dealing with him, may wholly break up and ruin him financially, with no adequate remedy if a court of equity cannot afford protection by its restraining writ.

The effect of the circulars sent out by the defendant Kane certainly must have been to intimidate dealers from buying of the complainant, or dealing in slates of his manufacture, because of the alleged infringement of the Goodrich patent. No business man wants to incur the dangers of a lawsuit for the profits which he may make as a jobber in handling goods charged to be an infringement of another man's patent. The inclination of most business men is to avoid litigation, and to forego even certain profits, if threatened with a lawsuit which would be embarrassing and vexatious, and might mulct them in damages far beyond their profits; and hence such persons, although having full faith in a man's integrity, and in the merit of his goods, would naturally avoid dealing with him for fear of possibly becoming involved in the threatened litigation. The complain-

ant, as I have already stated, was engaged in the manufacture of school slates under the Butler and Mallett patents; the Butler patent being much older than the Goodrich, and the Mallett patent being nearly contemporaneous in issue with the Goodrich patent, under which the defendant was manufacturing. But the proof in this case shows a still older patent, granted to one Munger, in 1860, for a muffled or noiseless slate, which most clearly so far anticipates the patents of both complainant and defendants, as to limit them, respectfully, to their specific devices. But I do not think the fact that complainant was the owner of these patents or operating under them, material to the questions in this case. The defendants claim that complainant's slates infringe the Goodrich reissue patent, and threaten complainant's customers with suits if they deal in complainant's slates. The state of the art to which the Goodrich patent pertains may be examined for the purpose of aiding the court in passing upon the question of defendant's good faith in making such threats, and the state of the art is only material, as it seems to me, for this purpose. The court will not attempt, in a collateral proceeding like this, to pass upon the validity of the Goodrich patent, but will consider, in the light of the proof as to the state of the art, and the proof as to defendant's conduct, whether the defendant made these threats against complainant's customers because he in good faith believed that complainant's slates infringed the patent and intended to prosecute for such infringement, or whether such threats were made solely to intimidate and frighten customers away from complainant, and with no intention of vindicating the validitity of his patent by a suit or suits. Instead of going into the courts to test the validity of the Butler patent, or the right of complainant to make the kind of slates he was putting upon the market, the defendant, in a bullying and menacing style, asserts to the trade by these circulars that complainant is infringing the Goodrich patent, and threatens all who deal in complainant's slates with lawsuits, and all the perils and vexations which attend upon a patent suit. The average business man undoubtedly dreads, and avoids, if he can, a lawsuit of any kind, but a suit for infringement of a patent is so far outside of the common man's experience that he is terrorized by even a threat of such a suit. There seems to me certainly good grounds for doubting the validity of the Goodrich patent in the light of the state of the art at

the time he entered the field; and that any lawyer well versed in the law of patents would surely hesitate to advise that the complainant's slates infringed the Goodrich patent, either before or after the reissue; and the conduct of the defendant in dismissing his suits for such alleged infringement without trial, shows that he did not believe that such infringement could be established.

I am, therefore, of opinion that the complainant has made a case entitling him to the interposition of a court of equity to prevent the issue of circulars, or written or oral assertion, that the slates made by the complainant are an infringement upon the defendant's patent; and a decree may accordingly be entered as prayed in the bill.

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## NATIONAL LIFE INS. CO. v. MYERS.

(Illinois Appellate Court, 1908, 140 Ill. App. 392.)

Freeman, J. It is contended in behalf of appellant that the agreement set up in the bill wherein appellant, in consideration of the withdrawal of an injunction and dismissal by appellee of a bill of complaint then pending, is said to have agreed not to publish an alleged libel, is void; that "the bill does not properly set up a conspiracy;" that the injunction order is void for uncertainty; and that equity has no jurisdiction to enjoin a libel.

So far as they are well pleaded the averments of the bill, for the purposes of this interlocutory appeal, must be taken as admitted. It is urged, however, by appellant's counsel that the correctness of some of the statements made in the publications referred to in the bill, and attached to and made a part thereof, are "nowhere denied." The bill alleges in the most emphatic manner that these publications contain false, scandalous and malicious statements and that they were prepared and circulated with the intent "to destroy the good name, reputation, property and business" of appellee; "for the purpose of attempting to levy blackmail," and for the purpose of "defrauding and injuring" appellee; that the publications contain "divers false, scandalous, malicious and libelous statements concerning your orator, its business, its property and its officers." A number of paragraphs from said publications are set forth in the bill, the statements of which are

specifically charged to be false and to have been published with the intent and for the purpose of injuring appellant in its business. It is averred that by said publications it was intended to create a false impression that appellee's affairs were under investigation by policy holders and others, that appellee had been guilty of crime and violated the penal laws in the management of its business and assets, that its officers are dishonest, have sworn falsely and handled appellee's assets with intent to convert the same to their own use, that appellee is insolvent and has reported fictitious assets, that in four years $1,600,-000 of appellee's assets have been converted to the personal use of officers and directors of appellee, all of which, as well as other like statements, the bill charges, are false and made for the purpose of destroying its business. It is charged that irreparable injury has been done and is being done by these publications for which no adequate remedy exists at law. In view, therefore, of the whole tenor of the averments of the bill, it is difficult to see what bearing the alleged failure to deny a specific statement in some of these publications has upon the question now before us as to the propriety of the interlocutory injunction of which appellant complains.

It is urged that the agreement was void which the bill states appellant entered into, not to publish or circulate thereafter "any false or defamatory written statements or reports about the good name, business, property or stability of "appellee, in consideration of the delivery by appellee to appellant of certain papers in its possession, the dissolution of an injunction against appellant and the dismissal of the bill of complaint upon which such injunction had issued. The contention seems to be that the consideration of this agreement was to the effect that appellant would "not publish or divulge matters in which the public had an interest," and that such agreement is void as against public policy; that "a promise not to do what the law prohibits" is an adequate consideration for such agreement. We are not aware of any rightful or lawful interest the public can have in false or defamatory publications made with intent wrongfully to injure the property and business of anyone. Appellant's contention seems to be to the effect that the contract referred to, which appellant is charged with having violated, was not and is not a valid subsisting contract, for want of a legal consideration, and therefore a court of equity will not and cannot interfere to restrain its breach. There

was, however, other consideration than the agreement by appellant not to publish. Certain papers which appellant evidently deemed of some value were delivered to him as a part of the consideration for the promise. The promise not to publish, apparently therefore, was based on a valuable consideration to appellant. Whether or not, when the evidence is presented, the contract will be deemed one the violation of which should be restrained, is not now the question. . .

It is further argued that equity has no jurisdiction to enjoin a libel and that the real scope of the bill is "to enjoin the publication and circulation of what is claimed to be a libel." Much space is given by appellant's counsel to discussion of the liberty of the press and to decisions in various jurisdictions to the effect that a "court of chancery will not restrain the publication of a libel because it is a libel." Prudential Life Ins. Co. v. Knott, 10 L. R. Ch. App. 142. In the present case it is claimed in behalf of appellee that the injunction in this case does not merely restrain the publication of a libel, as to which there is an adequate remedy at law, but that the fact that the publications complained of are alleged to be libelous is but an incident; that the jurisdiction of equity invoked in the case rests upon other and unquestioned grounds. If a libelous publication is in violation of a valid contract, if it is in pursuance of a wrongful conspiracy to destroy property rights and injure the business of appellee, if the parties issuing the libelous publication are insolvent and no remedy at law exists, if it is inflicting irreparable injury the extent of which cannot be definitely ascertained and for which there is no adequately remedy at law, if the bill shows that not only by publications, but by letters to appellee's agents and employees, appellant is interfering with appellee's business, is seeking to cause policy holders to lapse their policies and to cause its business to be so far ruined as to throw it into the hands of a receiver, and all this wrongfully and with malicious purpose, it is difficult to see why equity should withhold its preventive authority. In Barnes v. Chicago Typographical Union, 232 Ill. 424, 429, an injunction was granted, in which, among other things, the said union was restrained "from sending any circular or other communications to customers or other persons who might deal or transact business with said complainants or either of them for the purpose of dissuading such person from so doing." The court said: "The union published weekly what was called a directory of union printing offices of Chicago

containing the names of offices where the demands of the union were submitted to and a list of offices on strike, in which latter list were published the names of complainants. The purpose of this directory was to induce people not to deal with the complainants and to compel employes to leave their service." In that case it was urged on the part of the appellants as ground for demurrer that the relief prayed for would deprive the defendants of rights secured to them by article 11, section 4 of the Constitution, which provides that "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty." The injunction was, however, affirmed. . . .

It is doubtless true, as stated in Covell v. Chadwick, 153 Mass. 263, cited by appellant's counsel, that "so far as the bill alleges libel by the defendant on the plaintiff, unless he can show that they are somewhat more than mere false representations as to the character or reputation of his property or as to his title thereto, he is not entitled to a remedy by injunction." In the case at bar the publications are, according to the bill, more than mere libels, and where, as here, the bill distinctly avers essential facts forming the basis of the prayer for relief so as clearly to apprise the appellant of what he has to meet, it is not necessary than it contain the evidence or recite the circumstances in detail which would support its general statement. The present bill is particularly full in this respect. It clearly shows an irreparable damage which would not be adequately compensated by action at law. The injunction does not attempt to restrain a mere libel. It restrains wilful, malicious and irreparable injury to appellee's property rights, for which the bill shows there is no other adequate relief.

Finding no error in the record the interlocutory order granting the injunction will be affirmed.

Affirmed.

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## MUNDEN v. HARRIS.

(Court of Appeals of Missouri, 1910, 153 Mo. App. 652, 134 S. W. 1076.)

Ellison, J. This action is stated in a petition with two counts, one for damages for disturbing plaintiff's privacy by publishing his

picture without his consent; and the other for libel in publishing the picture along with false statements attributed to plaintiff. In each count punitive damages were asked, but no special damages were alleged. Defendants demurred to the petition as not stating a cause of action. The demurrer was sustained, and plaintiff refusing to amend, judgment was rendered against him and he appealed.

Plaintiff is an infant five years old and the action was brought through a "next friend" as required by statute. The facts stated in the first count of the petition are that defendants, being jewelry merchants in Kansas City, invaded plaintiff's right of privacy by willfully and maliciously using, publishing and circulating his picture for advertising their business of selling merchandise; thereby destroying his privacy and humiliating, annoying and disgracing him and exposing him to public contempt.

In the second count the facts, after certain preliminary allegations, are stated to be that: "defendants did wrongfully and maliciously compose, print and publish and cause to be composed, printed and published, of and concerning plaintiff, together with his photograph, the following false, defamatory, scandalous and malicious libel meaning thereby, and so understood by persons who saw the same, to impute to plaintiff a falsehood and attributing to plaintiff in said publication, a statement which was false and malicious, to-wit: 'Papa is going to buy mamma an Elgin watch for a present, and some one (I musn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of Harris-Goar Co., 1207 Grand Ave., Kansas City, Mo. Gifts for Everybody, Everywhere in their Free Catalogue.'"

| Picture of Plaintiff |
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The upshot of defendants' position in support of their demurrer to the first count, is that there is no right of privacy of which the law will take notice; or, stated differently, their argument is that the law does not afford redress for an invasion by one person of another's privacy unless it is accompanied by some injury to his property or interference therewith; and that the mere printing and publishing one's picture does not and cannot affect his property. The cases principally relied upon by defendants are those of Roberson v. Rochester Folding Box Co., 171 N. Y. 538; Henry v. Cherry & Webb,

———R. I. ——— (73 Atl. 97 ); and Atkinson v. Doherty, 121 Mich, 372; in the first of which, in the course of an interesting opinion concurred in by a majority of the court, is found a course of reasoning which denies that a right of privacy exists which can be protected by a court of equity. That case was a bill in equity to enjoin a mercantile firm from publishing a young woman's picture as an attraction to an accompanying advertisement of a certain brand of flour. The court in denying the right of equity to protect a person thus embarrassed, shows its unfriendliness to the claim in the following language: "The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise."

The conclusion of the court is based much upon the statement that the case there presented was without precedent, and, while admitting that equity, in the beginning and early part of its administration, was made up of growth, case by case, which was without precedent, being based merely upon the conscience of the chancellor, yet there came a time when its growth ceased and what was formerly the personal conscience of the chancellor, became a "juridical conscience," which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it, or which by analogy or parity of reasoning ought to govern it." With such consideration as a guiding thought, the court refused relief because there was no precedent for it and it did not appear to be within any recognized legal principle. This view is approved in Henry v. Cherry & Webb, which was an action at law in the nature of trespass for damages for an invasion of the right of privacy by using and publishing the plaintiff's picture as an advertisement in aid of the sale of merchandise. In such respect it was like Roberson v. Rochester Folding Box Co. Though one was an application in equity for restraint and the other

was for damgaes at law, yet as each by similar reasoning, denied that there was any such right, both denied any remedy.

The remaining case (Atkinson v. Doherty & Co.) was where after the death of John Atkinson, a celebrated lawyer, the defendants, who were manufacturers of cigars, named a brand of their make the "John Atkinson Cigar," and placed the name, together with his picture, as a label on cigar boxes. His widow sought to restrain such acts by injunction. Her right was denied; and again the reasoning in Roberson v. Rochester Folding Box Co. was approved. But it will be observed that while the Roberson case involved the right of privacy of the plaintiff's own picture, the Atkinson case, like that of Schuyler v. Curtis, 147 N. Y. 434, sought to protect the right of privacy to the name of a deceased relative, a case which did not call for much that was said in the course of the opinion, concerning the general right of privacy, except by way of argument or illustration; and what was said beyond the right of privacy which may be claimed by relatives of a deceased, must be regarded as dictum. The point of agreement in these cases is that no relief can be had by way of protecting a right of privacy, for the reason that it was not a right of property and did not fall within any legal principle.

But courts which refuse assent to those decisions assert that it *is* a right of property and that there *is* such legal principle, old and well recognized; though they concede the case is new in its facts. The main ground for division of opinion in these courts is at last found to be based on those conflicting assertions. So therefore it appears that if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property.

Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common to every man. One is not compelled to show that he used, or intended to use, any right which he has in order to determine whether it is a valuable right of which he cannot be deprived and in which the law will protect him. The privilege and capacity to excercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture,

it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. Judge Gray, in his dissenting opinion in Roberson v. Rochester Folding Box Co., supra, said, at page 563 of the report, that: "The proposition is, to me, an inconceivable one that these defendants may, unathorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity."

One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his *own* profit and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?

It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty and the pursuit of happiness, are rights of all men. The right to life includes the pursuit of happiness, for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in Roberson v. Rochester Folding Box Co., supra, while denominating the right of privacy as "a phrase" and "a so-called right," yet concedes that it is a something which to disturb is an "impertinence." The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity; and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.

We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value in that it is one of the modes

of securing to a person the enjoyment of life and the exercise of liberty; and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity, or damages in an action at law. If there are special damages they may be stated and recovered; but such character of damages is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

It ought, however, to be added that though a picture is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who by a course of conduct, has excited public interest. And it ought also to be understood that the right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations. By becoming a member of society one surrenders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely so long as it is free from slander. But the difference between that right and a claim to take another's picture against his consent, or to make merchandise of it, or to exhibit it, is too wide for hesitation in condemning the act and granting proper relief.

The foregoing views find ample support in thoroughly considered cases decided in recent years. (Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190; Vanderbilt v. Mitchell, 71 N. J. Eq. 632; Edison v. Edison Mfg. Co., 73 N. J. Eq. 136; Foster-Milburn Co. v. Chinn, 134 Ky. 424.) These cases are supported by the dissenting opinion of Judge Gray, writing for the minority of the court, in Roberson v. Rochester Folding Box Co., supra. And we think the principle they announce is practically conceded in Schuyler v. Curtis, 147 N. Y. 434, hereinbefore cited. Several of these cases make acknowledgment to a very able article in 4 Harvard Law Review, 193.

In the Schuyler case a near relative of the deceased, Mrs. Schuyler, sought to enjoin admirers of her many virtues and good deeds from placing her statue in a public place. It was held that relief could not

be had on the ground of the deceased's right of privacy, as that right necessarily died with her. And that so long as no aspersion was intended to be cast upon the dead; so long as the dead were intended to to be honored in appropriate manner and not slurred or defamed in such way as to outrage the feelings and sensibilities of surviving relatives, there could be no cause of complaint by them. That the alleged injury, in that case, to the sensibility of relatives was fanciful rather than real, and it was therefore not a subject for interference by the courts.

We will now consider whether a cause of action for libel is stated in the second count. Our statute (sec. 4818, R. S. 1909) declares a libel upon a person to be a thing "made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule. . . ." The printed matter set forth in the petition is the utterance of falsehoods, of a character tending to incite ridicule.

It was argued that the printed matter published consisted of purported utterances of plaintiff which were falsehoods and that to charge one in writing with being a falsifier was libelous per se. We are not inclined to base our decision on that ground, since we believe the statement purporting to have been made by plaintiff was palpably not intended to be understood, and would not be taken to be a false statement of fact, but rather as an imaginary statement attributed to him by defendants for the purposes of advertisement of their goods.

But it seems to us clear that considering the publication of the picture and the printed matter, as a whole, it would expose plaintiff to ridicule and contempt unless his age (to which we will presently refer) would exempt him. It is a public statement of what plaintiff had said about the private affairs of his father in relation to a present for his mother, and is a reference to the private social affairs of his sister. Connecting these statements with his picture and using them as an advertising aid to business was necessarily bound to cause him to undergo the vexation and humiliation of ridicule though it was not believed he had really made the statements. It does not require any imagination to realize what a suggestive handle it would give to the teasing propensities of his fellows, to be used by them without stint and without regard to his distress. What right had these defendants to thus wrong him? It would be a matter of regret if the law did not

afford him a remedy and such an one as would probably prevent repetition. The extreme to which Judge Parker went on the right of privacy in Roberson v. Rochester Folding Box Co. did not lead him to say that a party was altogether without remedy. At pages 556 and 557 of the report he concedes that libel could be maintained.

But we are not left to a mere concession. The case of Pavesich v. New Eng. Life Ins. Co., supra, like that at bar, was instituted by petition in two counts, one for damages for an invasion of the right of privacy by publishing the plaintiff's picture in connection with an advertisement wherein he was said to have uttered language in advancement of the business advertised, and the other for libel. The opinion of Justice Cobb is not only an able and exhaustive consideration of the remedy in equity for restraint and at law in damages, for an invasion of the right of privacy, but it includes a distinct and separate affirmation of the right to maintain libel; and that in a case of the kind we have now before us the matter was such that if found by a jury to be untrue, would have been libelous per se and no special damages need be alleged. So it was determined by the Supreme Court of the United States, that the publication of a woman's picture in connection with an advertisement of whiskey was a libel which might work serious harm to her standing with some portions of the community. (Peck v. Tribune Co., 214 U. S. 185, overruling the same case in 154 Fed. Rep. 330.)

The plaintiff is an infant only five years old, which facts brings a subject into the case deserving serious consideration. Can an infant be slandered or libeled?

The question is easily answered in the affirmative, yet the answer involves the further consideration whether it should not be qualified by way of exception. It seems well settled that an infant is liable for his torts, among which are libel and slander. (Fears v. Riley, 148 Mo. 49; Jennings v. Rundall, 8 T. R. 335; Starkie on Slander, sec. 347.)

But that statement cannot be accepted broadly. For malice and evil intent are necessary ingredients in these torts and therefore sometimes the age of the infant may become of the highest importance in determining his liability. If he be of such immature and tender years that he cannot form malice or entertain conscious evil intention, he cannot be guilty of either libel or slander. It would be a ridiculous

statement to say that a prattling child, two or three years old, could slander or libel another. It would be almost, if not quite, as ridiculous to say that an infant twenty years old could not entertain malice so as to be guilty of these wrongs. Where, then, is the line to be drawn? We think the rule in criminal cases applies, for they and libel and slander have malice for a common ingredient. Doli incapax finds place in the consideration of the question. An infant is not liable to an action of slander "until he is doli capax 'capable of mischief'—which, presumptively is not until he is fourteen years of age." (Tyler on Infancy, sec. 127; Newell on Slander and Libel, 370; Odgers, Libel and Slander (star page) 353.) The rule at common law, in force in this state (State v. Tice, 90 Mo. 112) is that a child under seven years of age is doli incapax—incapable of committing a crime; and between that age and fourteen he may or may not be: over fourteen he is as an adult. And so if he is under seven he should be considered incapable of libel or. slander. These wrongs are indictable in this, and many other countries, as state offenses, and it would be an inconsistency to be avoided, if possible, to say, as a matter of law, in one forum, that the child could be capable of the act, and in the other that he could not.

It is not inconsistent with, nor an objection to, this view that a child of tender years may commit a trespass and be civilly liable for damages. Doli capax cuts no figure in that instance for a trespass does not necessarily imply malice, or evil intention. So a boy under seven years, was held liable for breaking down shrubbery and destroying flowers. (Hutching v. Engle, 17 Wis. 237.) And Judge Cowen, in Hartfield v. Roper, 21 Wend. l. c .621, cites a case where an infant only four years old was stated to be liable in trespass. But in such extreme instances it is conceded that punitive damages could not be had; this, on the ground that wantonness or malice could not be imputed.

Though in some degree allied to the point in discussion, it is not necessary for us to say at what tender age, arbitrarily fixed, an infant would not be liable for fraud, but manifestly, there is a period of immaturity when he could not be guilty of wrongful deception. Clearly he should be of such years of discretion that such a wrong could be fairly charged to him. In Watts v. Cresswell, 3 Eq. Cas. Abr. 515 (9 Vin. Abr. 415) it was said that "if an infant is old enough to con-

trive and carry out a fraud, he ought to make satisfaction for it." Which is but another mode of saying that unless he has sufficient years of discretion to invent and perpetrate a fraud, he could not be held to have committed one.

Though, as thus shown, a child of tender years be incapable of uttering a slander or publishing a libel, it does not follow that he may not be slandered or libeled. The two positions are not dependable upon one another. In some instances and in some stages of infancy, opprobrium could not affect a child. Much would depend upon the nature of the offensive imputation. If an infant at the breast of his mother was charged with being a thief, it probably would not be slander, since it is not possible for him to commit larceny, either in point of fact or point of law. But if such infant should be charged with being afflicted with a loathsome and permanent disease, or with a private and humiliating physical malformation, these are charges which could be true and furthermore, they are species of defamation which would grow and the harmful effect of which would increase with the passing of time, and we can see no reason why it would not be slander. It has been decided that the fact that an infant is too young for criminal responsibility will not bar him of his action against his traducer. (Stewart v. Howe, 17 Ill. 71.) By the statute of Illinois the common law criminal irresponsibility for crime was raised from seven to ten years in cases of larceny, and a girl of age between nine and ten was charged with being "a smart little thief." The defendant sought to escape liability on the ground that she could not commit the crime of theft. The judge delivering the opinion became heated and indignant and characterized the defendant as a "reputational infanticide," and said that he "would sooner see the action abolished than to read out infancy from the pale of its protection."

The foregoing is sufficient for an understanding of our views in relation to plaintiff's liability to be wronged, or, if it may be so expressed, his capacity to be injured. In our opinion, notwithstanding he was but five years old, he was liable to the ridicule of his fellows. His susceptibility to vexation and humiliation was at hand and his appreciation of the outrage committed by defendants would grow in greater proportion than would the failure of memory in his associates.

It is well enough to add that a trial may disclose that plaintiff was less than five years old; and so much less as not to be the subject of

ridicule, or contempt, or public hatred by any appreciable number of the community (Peck v. Tribune Co., supra). If so, then, under the views we have expressed, he was not libelled. It may be that his years and his intelligence were such that to be subject of ridicule, contempt or hatred would be a matter over which persons would differ, in which event the question could not be withdrawn from a jury, but would be for their consideration as to the law and the fact, as is proper in libel.

The result of the foregoing consideration is to reverse the judgment and remand the cause for trial. All concur.

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## SECTION XI. INTERFERENCE WITH DOMESTIC, SOCIAL AND POLITICAL RELATIONS

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### EX PARTE WARFIELD.

(Texas Court of Criminal Appeals, 1899, 40 Tex. Crim. 413.)

HENDERSON, J. This is an original application for a writ of habeas corpus, which grew out of contempt proceedings in the Forty-fourth Judicial District Court of Dallas County. It appears that Will R. Morris, as plaintiff, brought a suit against J. B. Warfield, as defendant, before Judge Richard Morgan, in the Forty-fourth Judicial District Court of Texas, for $100,000. The petition alleges a number of acts on the part of J. B. Warfield, the defendant in that suit, interfering with marital relations existing between Will R. Morris and his wife, Vivia Morris, said acts causing a partial alienation of the affections of his said wife; and further suggesting that the course of conduct of said Warfield towards the wife of said Morris, if permitted to continue unrestrained, would likely culminate in the total alienation of the affections of his said wife, and the destruction of the marital relations existing between them. And said Morris asked for a writ of injunction restraining said Warfield from visiting or associating with plaintiff's said wife, or going to or near her at a certain house, No. 129 Marion Street, or any other house or place in the city of Dallas, or

State of Texas, where his said wife might be, and that he be restrained from writing or speaking to her, or in any manner, either directly or indirectly, communicating with her, by word, letter, writing, sign, or symbol, and also asking that his agents and employes be restrained from the like, etc.; and that said Warfield and his agents and servants be restrained from interfering with plaintiff in his peaceful efforts to seek, talk, write or communicate with his said wife, etc. The writ was granted on the 23d of February, 1899, and was served on Warfield on the following day, the 24th of February. On the 9th of March following, plaintiff sued out an attachment against said Warfield, alleging that he had violated said writ of injunction, and made a motion for rule against him for contempt for a violation thereof. . . .

Now, recurring to the subject matter of this litigation as set forth in plaintiff's petition, we think there can be no question that appellant sets forth a cause of action for the partial alienation of his wife's affections. The marital relation existing between these parties was a civil contract, binding, until it should be abrogated, upon both of the spouses. "He is entitled to the society of his wife, and may sue for damages any person enticing her away from him; and, whenever a wife is not justified in abandoning her husband, he who knowingly and intentionally assists her in thus violating her duty is guilty of a wrong for which an action will lie." See 2 Lawson, Rights, Rem. and Prac., sec. 714. "It is legal presumption that a wife's services and the comfort of her society are fully equilavent to any obligations which the law imposes upon her husband because of the marital relation, and her obligation to render family service is coextensive with that of her husband to support her in the family." Id., sec. 715; Schouler, Dom. Rel., sec. 41; Bennett v. Smith, 21 Barb., 439; Barnes v. Allen, 30 Barb. 663. A husband, from time immemorial, has an interest in the services of his wife, springing from the marital relation. In this State suits for personal injuries to her must be maintained by the husband predicated upon this idea. The suit here was brought for damages on an alleged partial alienation of the affections of his wife, and it was averred that, on account of the past conduct of the defendant in that suit, plaintiff was apprehensive, and had just grounds to fear, that, by a continuance thereof, the wife's affections would be entirely alienated. There would consequently be a breach and destruction of the matrimonial contract existing between the parties, by which plain-

tiff would entirely lose the affections and services of his said wife. These, it must be conceded, were of a peculiar value to plaintiff; and it would seem that, if the court had the power to maintain this suit for damages on account of the partial alienation of the affection of his said wife, he would have a right to invoke the restraining power of a court of equity to prevent the utter alienation of his wife's affections and the utter destruction of the marital agreement. We believe this would be so under the liberal rules of equity, as now practiced in the courts, but much more so under the provisions of our statute on the subject of injunctions. Article 2989, Revised Statutes, provides that the judges of the district courts may grant writs of injunction in the following cases: "(1) Where it shall appear that the party applying for said writ is entitled to the relief demanded, and such relief or any part thereof requires the restraining of some act prejudicial to the appellant." This provision shows that it was intended to be broader than the ordinary authority, because, in the third subdivision of the act, the court is authorized to grant the writ in all other cases where the applicant for said writ may show himself entitled thereto under the principles of equity. For a construction of these provisions, see the able opinion of Judge Denman of the Supreme Court in Sumner v. Crawford, 91 Texas, 129. After reciting the provision of the statute, the learned judge used this language: "It will be observed that the latter portion of the article requires the case to be brought within the rules of equity, and does not undertake to state the circumstances entitling the applicant to the writ, and therefore, under it, it must appear that there is no 'adequate remedy at law,' as that term has always been understood. But the first portion of the article does state what facts will justify the issuance of the writ thereunder, and does not require that there shall be no adequate remedy at law." And we would further suggest that the question decided in said case is very much in point in this case, as showing the liberality of our courts in granting writs of injunction. The court below, it will be conceded, had jurisdiction and authority to maintain the suit, and it can not be seriously questioned that the principal object of the suit was to perserve the marital relations existing between plaintiff and his spouse, and to conserve, as far as may be, and rehabilitate, her affections for the plaintiff. It was claimed, by the continued conduct and interferences of the defendant in that suit, that the integrity of the marital relation was

threatened, and, if his course of conduct was suffered to continue, that the marital relation would be destroyed. Among other things, it was alleged that said defendant exercised an undue influence over the wife of plaintiff, and, if suffered to associate with her and speak and talk with her, and visit her, it was very likely he would entirely corrupt and lead her astray, and therefore the power of the court was invoked to arrest these interferences, and defendant was enjoined from speaking or talking with her, or visiting the house where she was staying. It occurs to us, if the suit itself was maintainable, that the acts complained of were prejudicial to the plaintiff; indeed, that, by their continuation, the real object of the suit would be entirely frustrated; and that the court consequently had the power and authority to inhibit said defendant from interfering with plaintiff's wife, and that this was no interference with the inalienable rights of the citizen to go where he pleased, and to associate with whom he pleased, and to pursue his own happiness in his appointed way, provided such course of conduct did not interfere with another's right. "He had a perfect right to so use his own as not to abuse another's." Nor is there any inconsistency, when thus construed, between the freedom of speech and of the press and the integrity of the marital relation. The law is as much bound to protect the one as the other, and, when both can be construed in harmoney, it is the duty of the courts to protect both.

It has been said that applicant was not shown to have violated the spirit of the injunction, inasmuch as no conversation was shown of a character calculated to persuade or lead away the wife of the plaintiff; but his conduct was certainly in violation of the letter of said injunction, and we can not say that the court did not have the right and authority to make the injunction as broad as it did, as, under the allegations of the petition, it is shown that defendant was not to be trusted in the society of Mrs. Morris, or to speak with her.

But, even if it be conceded that the act of the court in this regard is of doubtful validity,—that is, that it may or may not be void,—still we do not feel inclined to interfere. The defendant in that suit had his right to invoke the action of that court to dissolve that injunction. He did not do so, but he saw fit to willfully disregard it, and he now claims before this court that the same was absolutely void, and that he had the right to defy it and set it at naught. It occurs to us that the injunction could have been easily obeyed, without infringing upon

any of the fundamental rights of the applicant. We accordingly hold that the applicant does not show himself entitled to be relieved. It is therefore ordered that he be remanded to the custody of the sheriff of Dallas County, and undergo the sentence imposed upon him by the judge of the Forty-fourth Judicial District Court. It is further ordered that the costs incurred in this court be taxed against the applicant.

Relator remanded to custody.

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## ENGLE v. WALSH.

(Supreme Court of Illinois, 1913, 258 Ill. 98, 101 N. E. 222.)

VICKERS, J. Charles F. Engle filed a bill in the circuit court of Cook county against the Amalgamated Sheet Metal Workers' Labor Union No. 73, International Alliance, (hereinafter referred to as the union), and Thomas Redding, president, Thomas Walsh, business agent, and other persons, officers and members of committees and boards of the union, for an injunction restraining the defendants from enforcing, or attempting to enforce, a fine which had been imposed upon the complainant by said union for an alleged violation of the rules of the union for the alleged misuse of the union label on non-union furnace stacks. . . .

From the foregoing statement, which embodies all of the material allegations of the bill, it is apparent that plaintiff in error is seeking to invoke the jurisdiction of a court of equity in a controversy that has arisen between him and the union of which he is a member. The rights, if any, which plaintiff in error is seeking to enforce are such as he has acquired by reason of his membership in the union. He seeks to retain his status as a member, with all rights incident thereto, without the payment of the fine which has been imposed upon him by the legally constituted authorities of his union. It is not charged that the hearing before the executive board was wanting in any requirement prescribed by the rules of the union. The effect of the allegation on this point is that plaintiff in error was erroneously and wrongfully convicted, and he appeals to a court of equity for the purpose of having the wrong redressed. The courts have frequently been called upon to restrain voluntary associations, such as churches,

lodges of various kinds, boards of trade, and the like, from expelling members for an alleged violation of some rule or regulation of the association, and in such cases this court has uniformly refused to sanction the practice of calling on a court of equity to adjust disputes arising between such associations and its members, and in the board of trade cases that have come before this court it has refused jurisdiction of the controversy on the ground that the remedy of such member, if he has any, is in a court of law. (People v. Board of Trade, 45 Ill. 112; People v. Board of Trade, 80 id. 134; Baxter v. Board of Trade, 83 id. 146; Sturges v. Board of Trade, 86 id. 441; Board of Trade v. Nelson, 162 id. 431; Green v. Board of Trade, 174 id. 585.) In People v. Board of Trade, 80 Ill. 134, on page 137, it was said: "The board of trade, so far as we can see, is only a voluntary organization, which its charter fully empowers it to govern in such mode as it may deem most advisable and proper. It has adopted its by-laws, provided a forum for their enforcement, which has acted thereunder, and the court will not interfere to control its action." In churches, lodges, labor unions, and other like voluntary associations, each person on becoming a member, either by express stipulation or by implication, agrees to abide by all rules and regulations adopted by the organization. (Bostedo v. Board of Trade, 227 Ill. 90.) Courts will not interfere to control the enforcement of by-laws of such associations, but they will be left free to enforce their own rules and regulations by such means and with such penalties as they may see proper to adopt for their government. The case presented by plaintiff in error in his bill must fall, we think, within the rule announced in the foregoing authorities. . . .

Recurring again to the averments of the bill, it will be noted that plaintiff in error has made no attempt to set out the by-laws, rules and regulations of the union, nor is it charged, even in general language, that his trial was contrary to the prescribed procedure for such hearings. It does appear from the bill that a formal charge was lodged against him, that he had written notice of the time and place when and where a hearing would be had, and that he appeared before the executive board and participated in the hearing. He presented his side of the controversy to the board. Since it is not averred in the bill that this board was not the proper tribunal to hear the charge nor that its proceedings were contrary to the provisions of the

rules of the union, it must be assumed that the hearing was before the proper authority and that the proceedings were conducted in conformity to the prescribed rules. This being true, it cannot be said that the executive board had no jurisdiction to hear said charge. Jurisdiction is by legal implication admitted by plaintiff in error. Plaintiff in error having failed to set out the by-laws and regulations of the union, we do not know whether he had exhausted all of his remedies, by appeal or otherwise, within the union. If there is a by-law permitting plaintiff in error to appeal to some reviewing body from the decision of the executive board, clearly he would have no standing, in any event, in a court of equity until he had exhausted the remedies provided by his association for the redress of his supposed grievance. The bill was clearly defective in failing to show what the by-laws and regulations of the union are, since without them no court can determine what the rights of the member are. The bill is also defective in that it fails to show a want of jurisdiction or a case of such irreparable injustice and hardship as to warrant the interposition of a court of equity.

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## KEARNS v. HOWLEY.

(Supreme Court of Pennsylvania, 1898, 188 Pa. 116, 41 Atl. 273.)

Bill in equity for an injunction against the chairman and secretary of the democratic county committee of Allegheny county. . . .

DEAN, J. The members of the democratic county committee of Allegheny county by the rules of the party are elected at the primary elections on the last Saturday of August in each year. By Rule VII. the election officers must certify the vote for each candidate to the executive committee of each ward, borough and township, and also to the chairman of the county committee. The election of the delegates who are to compose the county convention to nominate candidates for county offices are elected at the same time, and the convention meets the following Monday or Tuesday. Rule VII. having provided for certification of the vote to the county chairman, Rule VIII. provides that "a list of the county committee so elected shall be prepared by the chairman, and announced at the county convention."

By Rule X. the county committee so chosen must meet the first Monday of April following, and elect a chairman to serve for the ensuing year. The defendant, Joseph Howley, had been elected chairman on the first Monday of April, 1897, and therefore was chairman in August of that year at the county convention. He announced the members elect to the county committee, so far as returns had been received. Quite a number of districts had not certified the election of members of the committee; these were announced as vacancies to the number of 258, out of a roll of 521. The chairman, Howley, at the proper time, called a meeting of the county committee, as provided in Rule X., for the first Monday of April, 1898; he was a candidate for re-election as chairman. The bill filed the Thursday before the meeting averred that in a large number, 258, of the districts announced as vacant, no duly elected committeeman had been certified; that Howley, in violation of the rules, had already filled vacancies with names of persons not elected, and was about to complete the roll with names of others appointed by himself; further, that he had erased from the roll the names of duly elected members, and was about to wrongfully appoint others. The prayer of the bill was that Howley be restrained by injunction from erasing names, and that he be enjoined from filling vacancies, or in any way tampering with or interfering with the roll. The defendants made no answer, but contented themselves with denying the jurisdiction of the court. After hearing testimony, the learned judge of the court below found the material facts averred by plaintiff to be true, and as a conclusion of law that the court had jurisdiction to entertain the bill and grant relief; therefore, he entered a decree restraining the defendants or either of them from adding names to the roll upon any pretense, or striking therefrom names, and annexed to the decree a roll of those whose names should properly appear thereon. Thereupon defendants bring this appeal and assign for error want of jurisdiction in the court.

We see in the evidence no reason to question the correctness of the court's finding of fact. Howley probably filled the vacancies with the names of democrats personally agreeable to himself, and it is by no means incredible they accorded with him in his ambition to continue himself in office. His opinion was that, by virtue of his office, he had power to fill the vacancies, and it is not clear that he was wrong in this opinion. However this may be, if he usurped the power or

wrongfully exercised it, he was amenable to his party, which could dethrone him and visit him with political penalties. But the question here is, has a court of equity jurisdiction at the instance of dissatisfied members of the party or committee to correct and make up the roll, and force warring democrats to associate with each other, when they are averse to such associations.

It is clear to us that no property right in plaintiffs or in others as members of the county committee existed. As a purely political committee it neither owned nor pretended to own or to derive any benefit from anything of value held by them in common. That money for legitimate election expenses was contributed by democrats to the committee, and by the members paid out, gave the one who handled the share put in his possession no personal ownership in it. He could derive honestly no personal benefit from the fund, and consequently had no property right. Such a duty, would be a very "dry trust," if honestly executed. But the learned judge of the court below was of opinion that, even if membership of the committee conferred no property right, nevertheless, under the act of June 16, 1836, which confers on the common pleas the jurisdiction and powers of a court of chancery in "The supervision and control of all corporations, other than those of a municipal character, and unincorporated societies or associations and partnerships," he had jurisdiction to entertain the bill and found thereon his decree. We have more than once decided that this act gives to the courts only the powers of the English court of chancery. See Kneedler v. Lane, 3 Grant, 523, where Justice Strong fully and clearly construes the act, and so pronounces. The English chancellor has always disclaimed authority to interfere with the action of voluntary and unincorporated associations where no right of property was involved: Rigby v. Connol, L. R. 14 Ch. Div. 482. We will not cumber this opinion with further citations from the English reports to sustain this view, for it is scarcely questioned by counsel for appellee. The court below we think was misled into claiming for the courts of Pennsylvania enlarged chancery powers, because of the tendency of our late legislation to regulate primary elections and prevent fraud and corruption by the election officers. It may be, if this bill had aimed to prevent a threatened violation of law by any of these officers, it could have been maintained. But there is no statutory injunction or prohibition directed to chairmen and secretaries of county committees; they are amenable alone to their

party, which is purely political. The authority of the courts in such a case is thoroughly discussed by the New York court of appeals in McKane v. Adams, 123 N. Y. 609. In that case McKane filed a bill to enjoin the democratic committee of Kings county from deying his membership. The court dismissed it, saying in the course of an elaborate opinion: "His status therefore is that, though his town association elected him as a delegate to the general committee of the county organization, the members of that body have refused to admit him to association with them in their office. And if they would and will not associate with him, upon what reasoning or principle should they be compelled to, and the aid of a court of justice invoked? The right to be a member is not conferred by any statute; nor is it derivable as in the case of an incorporate body. It is by reason of the action and of the assent of the members of the voluntary association that one becomes associated with them in the common undertaking, and not by any outside agency or by the individual's action. Membership is a privilege which may be accorded or withheld, and not a right which can be gained independently and then enforced. So when, as by the plaintiff's own showing, the committee refused to admit him as a member or to confirm his election, he was remediless against that refusal. No rights of property or of person were affected, and no rights of citizenship were infringed upon.

We adopt this language as expressing our opinion in this case, without referring to and citing the many cases to which counsel on both sides have called our attention, for none of them is of such authority as to move us from our previous decisions. The constitution and statutes of the commonwealth guarantee to all citizens the right of self-government by protecting them in the exercise of the elective franchise for all officers voted for at state and local elections; and lately, the law has gone further, and has so far recognized political parties as to pass an act prescribing the duties of officers at primary elections, and imposing severe penalties for misconduct. But beyond this, political parties and party government are unknown to the law; they must govern themselves by party law. The courts cannot step in to compose party wrangles, or to settle factional strife. If they attempt it, it may well be doubted whether they would have much time for anything else.

We reverse the decree and direct that the bill be dismissed at costs of appellee.

# CHAPTER IV. PREVENTION OF CRIMES AND CRIMINAL PROCEEDINGS

## POWERS v. FLANSBURG.

(Supreme Court of Nebraska, 1911, 90 Neb. 467, 133 N. W. 844.)

Three citizens and property owners in the village of Trenton began this action in the district court of Hitchcock county to enjoin the defendant from "conducting or in any manner operating and keeping open" a pool and billiard-hall in the village of Trenton. The finding and judgment were for the defendant, and the plaintiffs have appealed.

The petition alleges that the defendant's license has expired, and that he conducts the business complained of without a license; that he keeps and sells intoxicating liquors in his place of business without any license so to do, and allows drinking and swearing in his place of business, and in various ways keeps and maintains a disorderly and disreputable house, which has become and is a public nuisance. A large amount of evidence was taken, many citizens were called as witnesses, and the evidence in regard to the manner of keeping and conducting the business is somewhat conflicting, but there is evidence tending to prove that the defendant is keeping and selling intoxicating liquors contrary to law, and maintaining a disorderly house, and doing other illegal and improper things complained of in the petition. It is stated in the brief that the village council was enjoined by the district court from repealing the ordinance which provided for licensing billiard-halls, and that prosecutions were begun against the defendant for keeping and selling intoxicating liquors without license, and that these actions have been allowed to remain in the courts without determination, and that the courts and the officers of the law are preventing the good people of the village of Trenton from enforcing the law and from putting a stop to the unlawful actions and conduct of the defendant.

The evidence shows that an action was begun by this defendant in the district court to enjoin the village council from enacting an ordinance repealing the ordinance under which he was licensed, and in that action a temporary injunction was allowed as prayed, but the evidence does not show what became of these proceedings, nor whether the action was promptly tried or was unduly delayed. The evidence also shows that a complaint was made against this defendant in the county court of Hitchcock county, charging him with unlawfully keeping intoxicating liquors with intent to sell or dispose of the same contrary to law, and that a warrant was issued, under which a search was made of the premises and certain liquors found and the defendant arrested, and that a hearing was had before the county court, and that the defendant was held to the district court for trial, and a judgment entered by the county court ordering the liquors to be destroyed. The defendant in that action then gave bond for his appearance in the district court and for an appeal to the district court from the judgment ordering the destruction of the liquors. The evidence does not show what was done in this matter in the district court. There is no evidence tending to support the statements of the brief criticising the courts and officers of Hitchcock county.

If we consider only the allegations of plaintiffs' petition and the evidence which they introduced, it appears that the defendant has been guilty of various crimes as charged in the petition, and that he is violating the criminal law in many particulars. There seems to be a great diversity of opinion in regard to these matters as disclosed by the evidence, and we do not find it necessary to determine the preponderance of the evidence under the issues presented. The trial court made no special findings of fact. There is nothing in the petition or evidence to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he had committed, if indeed the defendant is guilty as alleged. The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interest of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all of the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained. If the defendant persists in keep-

ing and selling liquors without license at his place of business in Trenton, the criminal law is amply sufficient to punish such offenses. If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action. If the village authorities were improperly enjoined by the district court, the remedy is by appeal, and a review of those proceedings cannot be had in another and independent action. The plaintiffs have failed to allege or prove sufficient grounds, or, in fact, any necessity, for the extraordinary writ of injunction; nor have they shown any special interest, as distinguished from the interest of the general public.

The judgment of the district court is affirmed.

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## DAVIS ET AL v. THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS

(New York Court of Appeals, 1878, 75 N. Y. 362.)

Earl, J. The plaintiffs allege in their complaint that in January 1873, they were engaged extensively in the business of slaughtering hogs, in the city of New York; and they describe the manner in which they conducted their business, claiming that they slaughtered the hogs by the most approved, expeditious, humane and painless methods; and they allege that the defendant Bergh, the president of the defendant, The American Society for the Prevention of Cruelty to Animals, came to their place of business, and announced to them and their employes that they must discontinue slaughtering hogs by the methods then used, and thereupon arrested the plaintiff Crane and one of such employes for alleged cruelty to animals, and threatened that he would return in one week, and if he then found the plaintiffs or others carrying on said business, in the same way, he would arrest all persons engaged in it and stop the business, as often as he found plaintiffs conducting it in that way. They then allege the extent and character of their business and facts showing that if Bergh should carry his threat into execution they would suffer great damage, for

which no adequate remedy could be had in actions at law, a multiplicity of which would have to be instituted at great expense. They further allege that they are informed and believe that Bergh claims to have authority to interfere with and stop plaintiffs' business, under pretense of cruelty to the hogs slaughtered, and that they are apprehensive that unless restrained he will endeavor to carry his "threats into execution, and will continually interfere with and arrest plaintiffs and their employes, and stop said business so long as plaintiffs carry it on in the manner aforesaid;" and they pray judgment perpetually restraining the defendants and their agents "from interfering with plaintiffs in their business in any way or manner whatever and from interfering with their agents and employes while engaged" in such busiess. They do not allege that there is no valid law under which the defendants can act to prevent cruelty to animals, or that the defendants are not authorized to prevent such cruelty; but the claim put forth is that the plaintiffs do not practice any cruelty to the hogs and they thus tender an issue of facts as to their guilt or innocence of the crime alleged against them.

The defendants, in their answer, take issue with the plaintiffs, and allege, among other things, that the methods adopted by plaintiffs for slaughtering the hogs are cruel and are attended with needless torture and torment; and that Bergh went upon plaintiff's premises, at the time mentioned as an officer of the Society for Prevention of Cruelty to Animals, without any malice towards plaintiffs, and for the sole purpose of enforcing the laws of the State enacted to prevent such cruelty.

Upon the trial, the plaintiffs gave very positive evidence tending to show that they did not practice needless cruelty upon the hogs slaughtered, and also to show the allegations in their complaint as to the manner in which they would be greatly damaged by the threatened interference of the defendants. They also proved that the defendant Bergh came to their premises, as alleged, and announced that they must cease to slaughter the hogs in the manner then in use, and that he should return in a week, and if he found them slaughtering the hogs in the same way, he would arrest every man engaged. He made no threats to break up or stop their business,—but simply that he would make the arrest. . . .

Hence it cannot be disputed that Bergh was acting under a valid law and regular authority, and that he had the right to make the threatened

arrests, if the plaintiffs were actually engaged in violating the law to prevent cruelty to animals. The only question for contestation was whether, as matter of fact, they were guilty or innocent of such violation; and the determination of that question could not, by such an action as this, be drawn to a court of equity. Whether a person accused of a crime be guilty or innocent, is to be determined in a common law court by a jury; and the people, as well as the accused, have the right to have it thus determined. If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest: and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria,* unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society and his compensation for such risks may be found in the general welfare which society is organized to promote.

This action is absolutely without sanction in precedents or principles of equity. It is impossible, in a general way to define the cases in which courts of equity will intervene by injunction to prevent irreparable mischief. They will sometimes enjoin public officers, who are attempting to act illegally or without competent authority, to the injury of the public or individuals. As was said by Allen J. in The People v. Canal Board, 55 N. Y., 390: "That public bodies and public officers may be restrained by injunction from proceeding in violation of law, to the prejudice of the public or to the injury of individual rights, cannot be questioned." But the case contemplated by that learned judge was not one like this, where a public officer, acting in good faith, under competent authority, was threatening to arrest persons accused of crime, for the purpose of taking them before the proper tribunal for trial upon the question of their guilt

or innocence. The administration of the criminal law would be greatly paralyzed, if no criminal could be arrested until it could be infallibly ascertained that he was guilty of the offense charged. The case nearest in point for the plaintiffs is that of Wood v. The City of Brooklyn (14 Barb., 425). It is but a Special Term decision and yet it is by an able judge; and I will refer to it only to point out more clearly a distinction which I make. There an injunction was granted to prevent the enforcement of a void ordinance of the city of Brooklyn. Without determining whether that case was properly decided, it is widely different from this. If here, the law, under which Bergh was acting, had been wholly void, or if he had been wholly without authority to act under the law, then this case would have been analogous to that. But that case would have been widely different, and certainly have required a different determination, if the ordinance had been valid, and the sole question had been whether or not the plaintiff was guilty of its violation. It is therefore unnecessary to determine, in this case, whether the plaintiffs were, as matter of fact, guilty of violating the law; and for the reasons stated, the judgment must be affirmed, with costs.

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## BISBEE v. ARIZONA INS. AGENCY.

(Supreme Court of Arizona, 1912, 14 Ariz. 313, 127 Pac. 722.)

Ross, J. This is an action of injunction instituted by appellees to restrain the city of Bisbee and its marshal from enforcing the terms of an ordinance of said city requiring fire insurance agents to pay a quarterly license before transacting any business, and prescribing penalties for its violation. The complaint alleges the invalidity of the ordinance, irreparable injury not susceptible of estimation, and a multiplicity of suits. The appellants demurred to the complaint for insufficiency in that it shows upon its face an adequate remedy at law.

As a general rule, the equity side of the court may not be invoked when the complainant has a plain, speedy, and adequate remedy at law. An examination of the complaint, with a view of ascertaining from its allegations whether it discloses that the appellees had an adequate remedy at law, is necessary. For a violation of the terms of the

ordinance, the natural course, and the one provided by law, would be the arrest and trial of the transgressor in the municipal courts of the city of Bisbee. In that court and the superior court of Cochise county and the supreme court to which appeals may be had, the validity of the ordinance can be tested. The remedy ordinarily for such cases is in the criminal side of the courts, and we must presume the courts will declare the law, and, if the ordinance is found to be void, so adjudge it. Should it, however, be found invalid, the defendants would be in no worse position than if found innocent of violating a valid law. A party charged with crime has as much right to ask that equity pass upon the question of his innocence as to ask that equity pass upon the validity or invalidity of the statute or ordinance denouncing the crime. The inapplicability of the writ of injunction to cases of this kind can be very forcibly illustrated by this case. Had the trial court found the ordinance valid, it could pronounce no judgment of conviction. The matter would have to be relegated to the courts of proper jurisdiction and the issue there tried out. Had the court found the ordinance void, its judgment would become final, but no one will conted that equity should take cognizance to declare an ordinance void and not to declare it valid. Should the ordinance be found valid upon a prosecution for its violation, the appellees cannot complain, no matter how it may affect their business. If it is invalid, that becomes a matter of defense to be interposed in the criminal prosecution.

"The legality or illegality of the ordinance is purely a question of law, which it is competent for a court at law to decide. We cannot assume that the courts in which the validity of the ordinance is presented will not decide this question correctly. . . . The legal presumption is, that every court will decide questions presented for determination properly, and conduct proceedings before them fairly and impartially (Wolfe v. Burke, 56 N. Y. 115), so that it is at once apparent that the main question upon which appellee relies, namely, the invalidity of the ordinance, can be presented and determined in any action which may be instituted against him for the violation of this ordinance; and as the law is well settled, by numerous well-considered cases, that, as a general rule, a bill in equity will not lie to restrain prosecutions under municipal ordinance upon the mere ground of its alleged illegality, for the obvious reason that the party prosecuted thereunder has a complete remedy at law, because he can avail himself

of such illegality as a legal defense in prosecutions thereunder (Poyer v. Village of Des Plaines, 20 Ill. App. 30; Levy v. City of Shreveport, 27 La. Ann. 620; Dillon on Municipal Corporations, secs. 906, 908, note; High on Injunctions sec. 1244), it follows that the averment in the bill of appellee, that the ordinance of which he complains is invalid, is not, of itself, sufficient to entitle him to the relief granted by the lower court." Denver v. Beede, 25 Colo. 172, 54 Pac. 624.

The injury complained of may or may not follow a prosecution of appellees. Should the court trying the case declare the ordinance void, no considerable injury would result, and, should it find the ordinance valid and inflict punishment for its violation, it would be performing a plain duty, and, while the result might be very injurious to the appellees, the injury would be just what the law intends as a punishment for its transgression.

A multiplicity of suits may easily be avoided and could not follow, unless the appellees, pending the determination of the legality of the ordinance, choose to run the risk of repeating their acts. A temporary suspension of their business as insurance agents during the time required to test the validity of the ordinance in the law side of the courts is not as important to them as it is to the general public that the usual and ordinary procedure common to all offenses be followed. As was said in Davis v. American Society for the Prevention of Cruelty to Animals, 75 N. Y. 362: "If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy-house, or for violating the excise law, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria* unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risk of such a damage by being a member of an organized society, and his compensation for such risks may be found in the general welfare which society is organized to promote."

We do not wish to be understood as laying down an unbending rule to the effect that equity will never interfere and restrain the enforcement of ordinances criminal in their nature, for, as was said by Mr. Justice Field in Re Sawyer, 125 U. S. 200, 222, 31 L. Ed. 402, 8 Sup. Ct. Rep. 482: "In many cases proceedings criminal in their character, taken by individulas or organized bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity." This is not a case falling within the exceptions named by Justice Field. Here the city of Bisbee, through its officers, is in good faith endeavoring to enforce a penal ordinance passed under the belief that it was a *bona fide* exercise of legislative power. Had it been made to appear that the common council of the city of Bisbee, "under the pretense of seeking the good of that particular portion of society which is intrusted to its supervision," was attacking the vested property rights of the appellees, a different solution of this case would be necessary—equity would disregard the form of the transaction and consider its real purpose and substance. Before an injunction will issue to restrain officers from making an arrest for an alleged violation of law, the arrest must not only be illegal, but must be accompanied by interference with property rights. 22 Cyc. 905.

It might develop in a trial in the proper courts that foreign insurance companies that have paid to the state the percentage provided for in paragraph 813, Revised Statutes of Arizona of 1901, have a property right to carry on the business of insurance in all parts of the state without additional burdens in the way of licenses on their agents, yet it cannot be that appellees have a vested property right to transact that business. Their agency may be revoked at any time. They have no investment in the insurance business that may be ruined or depreciated. Their sole stock in trade is the right to solicit insurance and collect premiums. The loss sustained by the appellees by reason of a cessation of work during the time required to test the ordinance in the proper courts is purely speculative. In any event, at the end of such litigation they will have their property—the right to solicit insurance—unimpaired, save the contingency of its revocation by their principals. The only loss they are likely to suffer is the commissions on policies that they might have written in the interim.

The judgment of the trial courts is reversed, and the case remanded, with direction that the complaint be dismissed.

## HORSE SHOE CLUB v. STEWART.

(Supreme Court of Missouri, 1912, 242 Mo. 421, 146 S. W. 1157.)

FERRISS, P. J.—Bill for injunction filed in the circuit court of the city of St. Louis in November, 1907, by the Modern Horse Shoe Club, a corporation organized under the statutes relating to fraternal and benevolent organizations, and against the members of the board of police commissioners of the city of St. Louis, the chief of police, and one Gaffney, captain of police, commanding in the eighth police district of said city.

The bill alleges that the plaintiff is authorized to maintain and does maintain on the premises, number 2309 Chestnut street, in said city, a club house, consisting of twelve rooms, with furniture, fixtures and appurtenances; that the membership of the club is limited to male negro citizens of said city of good moral character, who believe in the teachings and principles of good government, and that its members are and were at all times so qualified; that each member paid an initiation fee of one dollar, and dues of one dollar every three months; that the expense of maintaining the club is derived from the fees and dues aforesaid, and from the distribution of food and drink furnished to its members; that in order to maintain itself and pay its expenses and indebtedness it is necessary that plaintiff should be enabled to furnish its members with club accommodations and facilities, and dispose of its supplies on hand to its members; that on several occasions the defendants raided and caused to be raided the club house and premises, and wrongfully and wantonly, and without process of law, arrested and caused to be arrested members of said club under the false charge of vagrancy; that said defendants have threatened and are now threatening to arrest each and every one of plaintiff's members found in said club house, and prosecute them under the false charge of idling; that by so doing they have terrorized the members of the club and prevented them from using and enjoying the club and its facilities; that the defendants have caused, and are now causing daily, the police officers of the city to visit the premises of the club, without any reason therefor, and for the only purpose of terrorizing the members of said club and disrupting said organization; that de-

fendants are threatening to continue said illegal raids and unlawful arrests so long as plaintiff operates its club house, and have ordered the officers of plaintiff to close its said club house under threat of arrest and prosecution. Plaintiff further alleges that its organization was made in good faith; that it maintains its club house in good faith, that at no time has anything unlawful or improper occurred therein; that its members are not vagrants, but law-abiding, industrious and hard-working men, and that they only enjoy, and will be permitted to enjoy, such privileges as plaintiff is authorized to furnish them by the terms of its charter, and that plaintiff has at no time exceeded its rights under its charter; that if defendants are permitted to carry their said illegal threats into effect, the result will be irreparable damage to plaintiff, and will deprive plaintiff's members of the rights and privileges to which membership in plaintiff's organization entitles them, and in the enjoyment of which they have a right to be protected by law.

Wherefore plaintiff prays a perpetual injunction against the defendant, restraining them from in any way molesting or interfering with plaintiff's members, officers or agents in or about said club, because of their being there, or on any false and pretended charge of vagrancy.

On the filing of this petition a temporary injunction was issued as prayed for.

The answer of the defendants denies each and every allegation in the petition, and for further answer alleges that plaintiff is not the real party in interest; that the plaintiff does not come into a court of equity with clean hands; that the pretended plaintiff corporation was not and has not been, up to the filing of this suit, conducted as a benevolent, religious, scientific, fraternal-beneficial, or educational institution or corporation, but for the purpose of evading the statutes of the State and the ordinance of the city of St. Louis relating to dramshops and the sale of intoxicating liquors; that the said pretended club was constantly being conducted for the aforesaid unlawful ends, up to the time of the filing of this suit; that said club has frequently been resorted to by, and has been the common lounging place and rendezvous of ex-convicts, thieves, vicious and dissolute women and other criminal characters of the negro race, and that the said pretended club is controlled and operated for purpose of private, pecuniary gain by one

Ollie Jackson, with the aid and assistance of persons to defendants unknown, and was organized by him shortly after his release from serving a term in the State penitentiary; that prior to and up to the filing of plaintiff's petition, said premises were the nightly scene of gambling, disturbances of the peace, and violations of the laws of the State relating to the sale of liquor, and was not a bona fide club, conducted for the sole use and benefit of its members, and that said pretended club has since the date of its organization, been what is popularly known as a lid-lifting club, and ought not to be protected by the court.

To this answer plaintiff filed a general denial.

The cause was heard at great length upon the facts, at the conclusion of which the court rendered a decree dismissing the bill as to all the defendants except Gaffney, and perpetually enjoining defendant Gaffney, his successors in office and subordinates, and the officers and men of the police force under them, from raiding or arresting, or in any way molesting or interfering with, plaintiff's members, its officers, agents, employees or servants, while in or about plaintiff's club house and premises, solely because of their being there, or from arresting on the premises of plaintiff said members on any false or pretended charge of vagrancy. Defendant appeals.

The evidence substantially sustains the allegations of the answer, and shows that the corporate form was used as a cloak under which the so-called club engaged in the sale of liquor in violation of law. Practically the only activities conducted in the club consisted in the selling of liquor and card playing. Liquor was sold over a counter in a room fitted up like an ordinary barroom, and was sold for cash at the same prices charged in licensed saloons. Such sales were conducted on every day of the week, including Sunday, and all night long. The evidence, on the other hand, shows that the police, acting under instructions from defendant Gaffney, attempted to break up this club by repeated raids and arrests made for that avowed purpose; that members were arrested as vagrants, and the charges subsequently dismissed; that such arrests were made not for the purpose of prosecution on charges of vagrancy, but for the sole purpose of breaking up the club. It further appears that the police entered the premises peaceably, quietly and without opposition, and that no injury was done or threatened to the physical property of the club.

The learned chancellor who tried the case below indicated very clearly in his opinion that he regarded the testimony sufficient to forfeit plaintiff's charter in a proper proceeding for that purpose, but condemned in vigorous language, as illegal, the methods instituted by the police to break up this establishment, and suggested that the proper method is by a proceeding in quo warranto. He held, properly that in the city of St. Louis the police may, without a warrant, make an arrest upon a well grounded suspicion that a crime, either felony or misdemeanor, has been committed. He was, however, of the opinion that repeated raids and arrests, upon charges of vagrancy, which were made for the avowed purpose of breaking up the club, and not for bona fide prosecution, were continuing trespasses which equity should enjoin, even conceding the truth of the allegations of the answer.

Without criticising the conclusions reached below as to the rights and duties of the police, and the character of their acts complained of, we are of the opinion that the chancellor did not give sufficient consideration to the question preliminary to all others, i. e., does the plaintiff show that its own conduct has been such as to justify it in asking relief in equity? In other words, does plaintiff come before the court with clean hands regarding the matter in controversy? This is not a proceeding instituted in behalf of individual members of the club who claim to have suffered from illegal arrests made by the police. The plaintiff invokes the aid of the court of equity to protect it in the exercise of rights which had been granted it by law. Such is the distinct claim of the bill. The court is not asked to punish the police officers for oppression in office, nor to mulct them in damages for injuries to the rights of plaintiff or its members. Its aid is invoked to protect plaintiff's right to exercise its functions as a club under the authority of its charter.

The first question to be considered is, whether such right of plaintiff is involved in this controversy. In this matter we must be governed, not by the allegations of the bill as to the rights of plaintiff under its charter, but by the proof as to what rights in point of fact are threatened with destruction by the actions of the police. The only "right" which plaintiff has exercised and desires to continue to exercise is the right to sell liquor in violation of law. If the efforts of the police are successful and result in breaking up the establishment, this

is, according to the evidence, the only substantial privilege that will be affected. Therefore, this suit in effect asks the court to protect plaintiff in its continued violation of law. The very statement of this proposition suggests the answer. The necessary effect of this injunction is to permit the plaintiff to continue to sell liquor without a license, and otherwise violate the law. We do not mean to say that the police are justified in resorting to illegal means to break up an illegal business, but we do mean to say that an illegal business cannot invoke the aid of a court of equity to continue its existence. If the police have adopted a high handed and even illegal method of procedure, the law affords a remedy, either by prosecution for the crime of oppression in office or by suit for damages. If the legal rights of a plaintiff are invaded, and there is no adequate relief at law, a court of equity will protect such rights by injunction, even if such protection require it to enjoin acts criminal in character. The primary question is not whether defendant has committed crime, or whether he is a trespasser. The first pertinent inquiry is, whether plaintiff has shown itself to be in the exercise of legal rights which will be destroyed without the intervention of a court of equity. If this inquiry is answered in the negative, the relief should be denied. The plaintiff in preparing its bill, very properly realized that it must show that the rights for which it was seeking protection were within the law. It therefore alleges that its organization was made in good faith; that nothing unlawful or improper had occured, or would occur, within its club rooms; that its members were law-abiding, industrious, hard-working men, and that they enjoyed, and would be permitted to enjoy, only such privileges as plaintiff was authorized to furnish by the terms of its charter, and that plaintiff has at no time exceeded its rights under its charter.

And what is the threatened injury? Here is the allegation in the bill on this point: "The result will be irreparable damage to plaintiff, and will deprive plaintiff's members of the rights and privileges to which membership in plaintiff's organization entitles them, and in the enjoyment of which *they have a right to be protected by law.*"

The bill clearly demands protection for such rights only as are granted plaintiff by its charter. The case breaks on this point. The evidence not only does not sustain these allegations of the bill, but

shows clearly, and without substantial dispute, that the so-called rights now sought to be protected are simple violations of law.

In the case of Weiss v. Herlihy, 23 App. Div. (N. Y.) 608, under facts quite similar to those in this case, the court uses this language, which we consider entirely proper here: "This plaintiff, according to the testimony made to appear upon this record, is persistently and flagrantly using these premises for a disorderly house in violation of the statute. He asks the help of the equitable power of the court practically for the purpose of permitting him to continue that violation of law. It is apparent that an injunction could have no other effect, and that just as soon as the observation and inspection of the police was withdrawn from this place, this gambling house would be reopened, to the scandal and inconvenience of the neighborhood. A court of equity will not permit its process to be perverted to any such purpose. Assume that the legal rights of this plaintiff are being infringed. If that be true, he must enforce them by the proper proceedings at law, and if he can do so, undoubtedly his rights will be protected or he will be recompensed for any violation of them; but if the law affords him no protection, equity will certainly not help him by putting its hand upon the officers of the law who are seeking to perform their duty—although possibly in a manner oppressive to this plaintiff—and restraining them for no other purpose than that this man may go on with his violations of the law unmolested and unwhipped of justice."

To the same general effect are Beck v. Flournoy Live-Stock Co., 65 Fed. 30; Pon v. Wittmen, 147 Cal. 280; Pittsburg Ry. Co. v. Town of Crothersville, 159 Ind. 330.

What we say in this opinion cannot be construed as a justification of illegal methods, if any, adopted by the police. As a court of equity, we refuse relief to plaintiff, not because some of its members are bad men; not because its manager and practical owner is an ex-convict; not merely because the evidence shows good grounds to forfeit its charter; not because we justify the action of the police; but because the plaintiff does not come into court with clean hands concerning the very subject-matter of this controversy, namely, its legal rights under its charter, and because it is not the province of equity to assist a wrongdoer in violating the law.

The judgment is reversed and the bill dismissed. Kennish and Brown, JJ., concur.

# SELECTED
# CASES ON EQUITY

BY

GEORGE L. CLARK
*Author of "Principles of Equity"*

PART II—CHAPTER V.

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# TABLE OF CONTENTS

## PART II.

### CHAPTER V.


TRUSTS .................................................. 1

Section 1. In General—Compared with Similar Relations .......... 1

Section 2. Essentials to the Creation and Existence of the Trust Relation .................................. 30

Section 3. Nature of Cestui's Interest ............................. 65

Section 4. Resulting and Constructive Trusts .................... 79

Section 5. Transfer of Trust Property ............................134

Section 6. Duties of a Trustee ....................................167

# TABLE OF CASES


Abbott, Huling v. 143
Acker v. Priest 79
Alden, Waterman v. 193
Aldrich v. Aldrich 30
Allen, Smith v. 134
Amer. Nat'l Bank v. Fidelity & Dep. Co. 72

Badgley v. Votrain 33
Bakewell, Reyburn v. 64
Barker v. Smiley 152
Barkley v. Donnelly 49
Barnes' Adm'r, Jewell v. 41
Barrow, Gun v. 66
Beaver v. Beaver 60
Bellamy, In re 157
Blackiston, Rhoades v. 159
Bloomington Lib. Ass'n, Mason v. 55
Bohle v. Hasselbroch 126
Bradford, Tillinghast v. 161
Bryant v. Craig 194
Bushnell, Wylie v. 179
Bushong v. Taylor 165
Butcher's Bank, Daly v. 12

Caldwell v. Caldwell 108
Capelle, O'Neill v. 107
Cargill, Whitehouse v. 23
Carll v. Emery 95
Carlton, Keyes v. 172
Cartwright v. Wise 88
Chamberlain v. Stearns 57
Chapman v. Shattuck 24
Chiles v. Garrison 5
City of St. Louis v. Keane 166
Clayton v. Roe 69
Clogan, Hoeffer v. 44
Cornwell v. Orton 149
Cox v. Walker 68
Craig, Bryant v. 194
Crandall, Woodhouse v. 121

Daily v. Butchers' Bank 12
Davis, In re 91
Dean v. Northern Trust Co. 63
Dewey, Thayer v. 189
Dix, Shoe & Leather Co. v. 76
Doheny, Gower v. 138
Donnelly, Barkley v. 49
Donnelly, Williams v. 142
Doyle v. Murphy 19
Drew, Everett v. 4
Duff v. Randall 140
Dumaresly, Fischli v. 133

Edwards v. Welton 175
Ellerson v. Westcott 114
Elliott v. Landis Machine Co. 70
Emery, Carll v. 95
Everett v. Drew 4
Ewing v. Parrish 65
Ewing v. Shannahan 70

Fidelity & Dep. Co., Amer. Nat'l B'k v. 72
Finney, Murdock v. 145
Fischli v. Dumaresly 133
Frazier v. Jeakins 130

Garrison, Chiles v. 5
Glidewell v. Spaugh 94
Gower v. Doheny 138
Gun v. Barrow 66

Haigh v. Kaye 104
Hale, Kellogg v. 1
Hall v. Hall 88
Hall, Matter of 184
Hasselbroch, Bohle v. 126
Heyworth, Tinkham v. 10
Highley, Pugh v. 139
Hoeffer v. Clogan 44
Howlett, Lee v. 146
Hoyle, Turner v. 75
Hughes, Whittlesy v. 197
Huling v. Abbott 143

Jackson, Porter v. 21
Jackson, Tyson v. 29
James v. Newton 27
Jamison v. Zausch 155
Jeakins, Frazier v. 130
Jenkins, McFadden v. 20
Jewell v. Barnes' Adm'r. 41
Johnson, Nebraska Nat'l Bk. v. 118
Johnston v. Spicer 150

Katz v. Miller 198
Kaye, Haigh v. 104
Keane, City of St. Louis v. 166
Kellogg v. Hale 1
Keyes v. Carleton 172
Knox College, Moshlier v. 138

Landis Machine Co., Elliott v. 70
Lee v. Howlett 146
Leeper v. Taylor 32
Lockren v. Rustan 37
Long v. Mechem 82
Lorenz v. Weller 58

McCullough v. McCullough 187
McDonough v. O'Neil 86
McFadden v. Jenkins 20
McFall, Moore v. 168
Markel v. Peck 198
Mason v. Bloomington Lib. Ass'n 55
Mechem, Long v. 82
Mercantile Co., Young v. 2
Merrill, Tillinghast v. 181
Mescall v. Tully 106
Miller, Katz v. 198
Mitchell's Adm'r v. Trotter 192
Molasky, Zeideman v. 18
Moore v. McFall 168
Moshier v. Knox College 138
Mulholland's Estate, In re 191
Murdock v. Finney 145
Murphy, Doyle v. 19

Nebraska Nat'l Bk. v. Johnson 118
New Jersey Title etc. Co. v. Parker 171
New Orleans etc. Co., Richardson v. 123
Newton, James v. 27
Northern Trust Co., Dean v. 63

O'Neill v. Capelle 107
O'Niel, McDonough v. 86
Orton, Cornwell v. 149

Parker, New Jersey Title etc. Co. v. 171
Parrish, Ewing v. 65
Payne, Wright v. 6
Peck, Markel v. 198
Perry v. Strawbridge 113
Peters, Rossow v. 83
Pfuntner, Pike's Peak Co. v. 127
Phillips v. Phillips 111
Pike's Peak Co. v. Pfuntner 127
Porter v. Jackson 21
Pratt, Stone v. 26
Priest, Acker v. 79
Pugh v. Highley 139

Quimby v. Quimby 50

Randall, Duff v. 140
Reilly, Schafer v. 141
Reyburn v. Bakewell 64
Rhoades v. Blackiston 159
Richardson v. N. O. etc. Co. 123
Roe, Clayton v. 69
Rossow v. Peters 83
Rustan, Lockren v. 37

Schafer v. Reilly 141
Scholle v. Scholle 132
Shannahan, Ewing v. 70
Shattuck, Chapman v. 24
Shoe & Leather Co. v. Dix 76
Simpson v. Waldby 14
Skiles v. Switzer 149
Smiley, Barker v. 152
Smith v. Allen 134
Spaugh, Glidewell v. 94
Spicer, Johnston v. 150
Starr, Sturge v. 142
Stearns, Chamberlain v. 57
Steib v. Whitehead 162
Stone v. Pratt 26
Sturge v. Starr 142
Strawbridge, Perry v. 113
Switzer, Skiles v. 149

Taylor, Bushong v. 165
Taylor, Leeper v. 32
Tennison v. Tennison 116
Thayer v. Dewey 189
Tillinghast v. Bradford 161
Tillinghast v. Merrill 181
Tinkham v. Heyworth 10
Trotter, Mitchell's Adm'r v. 192
Tully, Mescall v. 106
Turner v. Hoyle 75
Tyson v. Jackson 29

Van der Volgen v. Yates 99
Votrain, Badgley v. 33

Wagner v. Wagner 176
Waldby, Simpson v. 14
Walker, Cox v. 68
Waterman v. Alden 193
Weller, Lorenz v. 58
Welton, Edwards v. 175
West, In re 97
Westcott, Ellerson v. 114
Whitehead, Steib v. 162
Whitehouse v. Cargill 23
Whittlesy v. Hughes 197
Williams v. Donnelly 142
Wise, Cartwright v. 88
Woodhouse v. Crandall 121
Wright v. Payne 6
Wylie v. Bushnell 179

Yates, Van der Volgen v. 99
Young v. Mercantile Co. 2

Zausch, Jamison v. 155
Zeideman v. Molasky 18

# CASES ON EQUITY

## PART II.

## CHAPTER V. TRUSTS

### SECTION I. IN GENERAL—COMPARED WITH SIMILAR RELATIONS.

#### KELLOGG v. HALE[1].

(Supreme Court of Illinois, 1883, 108 Ill. 164.)

CRAIG, J. . . . The trust here was not in writing. The deed was absolute in terms, and purported to convey the title to Peck, but when the transaction is viewed in the light of the evidence, it appears that the property was conveyed to Peck in trust. He was to hold the title, lease the property, collect the rents, sell or re-convey, or make such disposition of the property as Kellogg might order. Was this such a trust as the Statute of Uses would execute? The answer to this question may be found in the former decisions of this court.

In Meacham v. Steele, 93 Ill. 146, where a question of this character was under consideration, it is said: "Where the conveyance imposes on the trustee active duties with respect to the trust estate, such as, to sell and convert into money, or to lease the same and collect the rents, issues and profits thereof, and pay them over to the beneficiary, it creates a trust which the statute does not execute." Here Peck, the trustee, had the entire charge of the property. It was his duty to rent, and collect the rents, pay the taxes, keep up the repairs, and in addition to this, upon request, sell and convey the property. The facts seem to bring the case directly within the rule announced in the case cited.

In Kirkland v. Cox, 94 Ill. 400, the effect of the Statute of Uses was under consideration, and it was held where an estate is conveyed to

[1] The statement of facts has usually been omitted. Where parts of the opinion have been omitted, such omission has been indicated thus: . . .

one person, for the use of, or upon a trust for, another, and nothing more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. But this has reference only to passive simple or dry trusts. In such case the legal estate never vests in the feoffee, but is instantaneously transferred to the *cestui que use* as soon as the use is declared The facts surrounding the conveyance in this case do not bring the trust within what may be called a passive, simple or dry trust. The duties of the trustee had not been performed under the trust imposed by the deed and contract. Those duties were active, and so continued until the lands were conveyed, under the order and direction of Kellogg. Perry on Trusts, sec. 395, in speaking in regard to special or active trusts, says: "If any agency, duty or power be imposed on the trustee, as by a limitation to a trustee and his heirs to pay the rents or to convey the estate, or if any control is to be exercised or duty performed by the trustee, . . . the operation of the statute is excluded, and the trusts or uses remain mere equitable estates." But the citation of other authorities on the question is useless. We are satisfied that the deed made to Peck passed the title to the property to him, unaffected by the Statute of Uses. . . .

---

## YOUNG v. MERCANTILE TRUST CO.

(United States Circuit Court, 1905, 140 Fed. 61.)

HAZEL, D. J. The bill is for an accounting. . . .

Complainant's theory is that the defendant was depositary and trustee, and hence fiduciary relations existed between them intitling complainant to an accounting. The demurrant contends, on the other hand, that the transaction simply amounted to a naked deposit, by which the relations of bailor and bailee were established. A court of equity doubtless has plenary power to determine the rights and liabilities arising between a trustee and the beneficiaries of a trust. It is evident, however, that the general allegation of trust or trusteeship, together with the object and purpose of its creation, is not here distinctly or sufficiently averred. It is pertinent to inquire, what did the defendant undertake to do other than become depositary or

bailee? The character of the trust, its extent or purpose, and whether in writing or by parol, is not disclosed. The essential elements of a trust, viz., a beneficiary, a trustee other than the beneficiary, the subject-matter of the trust relations, and surrender of the property and transfer of the title to the trustee, are not well pleaded. The claim that the orator parted with his property to the United States Shipbuilding Company upon receiving the securities, and then deposited the same with the defendant under an implied arrangement that such securities were to be distributed as he might direct, in my judgment was not sufficient to establish such express or implied trust relations as would warrant the interposition of a court of equity. Certainly it would seem that specific and definite facts to warrant the interference of a trust relation should have been pleaded, instead of merely general averments. The suggestions that the demurrer concedes the allegations of the bill is not entirely correct, as such admissions only include relevant facts such as are well pleaded, and not conclusions of law. John D. Park and Sons Co. v. National Wholesale Druggists' Ass'n, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578. The transaction, as pleaded, has all the earmarks of a mere deposit, and not of a trust, in which the legal title has passed to the trustee, and where the cestui que trust has the beneficial enjoyment. United States v. Union Pacific Railroad Co., 98 U. S. 619, 25 L. Ed. 143. "The term 'trust'," says Chancellor Kent in Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417, "is a very comprehensive one. Every deposit is a direct trust. Every person who receives money to be paid to another, or to apply to a particular purpose, is a trustee. The cases of hirer and letter to hire, borrower and lender, pawner and pawnee, principal and agent, are all cases of express trust, etc. It has never been held, however, that these and the like cases are such technical trusts as to bring them within our limited equity jurisdiction." . . .

My conclusion is that such facts and circumstances as are essential to confer jurisdiction on this court are not pleaded. . . .

## EVERETT v. DREW.

(Supreme Court of Massachusetts, 1880, 129 Mass. 150.)

Morton, J. This is an action of contract, and the substantial allegations of the plaintiff's declaration are, that the defendant made an agreement with Elijah C. Drew that he was to buy a parcel of land, to take the deed in his own name, and to execute a declaration that he held it in trust for the defendants, to pay a part of the consideration with money furnished by the defendants, and to give his own note and mortgage back for the balance thereof. The declaration also alleges that Drew purchased land of the plaintiff's wife and other persons; that he paid therefor $10,000 with money furnished by the defendants; that the owners made a deed to him, and he, at their request, gave his note and a mortgage containing a power of sale to the plaintiff; that the plaintiff foreclosed said mortgage by a sale; that, after applying the proceeds of the sale, there remains a balance due on said note; and that the defendants owe the plaintiff the said balance and the interest thereon.

The plaintiff contends that Drew throughout the transaction and in giving the note acted as the agent of the defendants, and that, as the note is not a negotiable promissory note, he had the right to maintain an action on it against them as unknown and undisclosed principals.

The general rule is well established that if an agent, acting for his principal, makes a contract without disclosing his principal, the latter is bound by the contract. Thomson v. Davenport, 2 Smith Lead. Cas. (5th Am. ed.) 358, and cases cited. He is bound because it is his contract made through another person. But this rule does not apply in the case at bar. Drew was not the agent of the defendants. He was not authorized to, and did not in fact, make any contract for and on behalf of them. He bought the land and took the title, he gave the note and the mortgage, in his own name and for his own behalf as trustee. The relations between him and the defendants were not those of agent and principal, but of trustee and *cestui que trust*. Such a relation is lawful, and, in the absence

of fraud, does not render the *cestuis que trust* liable to suits at law upon contracts made by the trustee in his own name.

It is true that the declaration alleges that Drew was the agent of the defendants. But it also alleges the specific facts which show the relations between the parties, and those facts show that he was not an agent. The allegations that he was an agent must be regarded as mere allegations of a conclusion of law which are not sustained by the facts. The defendants' demurrer was therefore rightly sustained.

Exceptions overruled.

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## CHILES v. GARRISON.

(Supreme Court of Missouri, 1862, 32 Mo. 475.)

This was an action for money lent by the plaintiff to defendants. The answer denies the loan, and denies any indebtedness to plaintiff. At the date of the alleged loan the money was in special deposit with the defendants, and was afterward stolen from them. . . .

BAY, J. The only question presented by the record in this case is as to the propriety of the instruction given by the court. If the loan was complete before the robbery, then the loss fell upon the defendants; but if, under and by virtue of the terms of the contract, anything remained to be done to vest in the defendants the right to the money, then the loss was incurred by the plaintiff. We think no question can arise in regard to the delivery, for the money was already in the custody and possession of the defendants, having been previously left with them in special deposit.

The court refused all the instructions asked on both sides, and gave in lieu of them the following:

"If the jury find from the evidence that the plaintiff, by her agent, William G. Chiles, agreed with the defendant Garrison for and on behalf of the firm of Garrison & Hughes, to loan to them the sum of eight hundred dollars, and that Garrison agreed, on behalf of said firm, to borrow the same, and that the money was at the time on deposit with said firm, and that nothing remained to be done at any future time to complete the loan, the jury will find

for the plaintiff; but if it was only agreed that the money should be loaned, and it was further agreed that William G. Chiles, or some one else on the part of plaintiff, should go to defendants to obtain their note or count the money, or both, before the loan was to be complete, and that, before the giving a note or counting the money, the safe of defendants was robbed, without the fault of the defendants, or either of them, and the money stolen, they will find for the defendants."

Whether the loan was perfected or not before the robbery, was a question of fact, depending upon the terms of the contract as disclosed by the evidence in the cause, and the instruction very properly submitted it to the jury. . . .

Upon the whole, we think the instruction given covers the law of the case; and as the jury have passed upon the facts, we see no good reason to disturb their verdict.

With the concurrence of the other judges, the judgment of the court below will be affirmed.

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## WRIGHT v. PAYNE.

(Supreme Court of Alabama, 1878, 62 Ala. 340.)

The appellant, William H. Wright, brought this action, on the 17th day of November, 1874, against the appellee, Benjamin F. Paine, as the administrator de bonis non of the estate of William O. Winston, deceased, and sought to recover on the following receipts, to-wit:

"Deposited with me, for safe keeping, by William H. Wright, eight hundred and five dollars ($805) in gold, which I am to return whenever called for, this 4th day of November, 1857.

(Signed) WM. O. WINSTON."

Upon this receipt was the following indorsements:

"Presented for settlement, April 20th, 1872.

J. N. WINSTON,
Administrator of estate of Wm. O. Winston."

The second receipt is as follows:

"Received, January 25, 1858, of Wm. H. Wright, forty dollars in gold, on deposit, to be paid him on demand ($40.).

(Signed) W. O. WINSTON,
Per J. N. WINSTON."

This receipt was also presented to the administrator on the 20th of April, 1872.

The original complaint contained no averment of demand, but simply charged that the money due on receipts was still unpaid. An amendment, averring a demand on Winston in his lifetime, was subsequently made. . . .

BRICKELL, C. J. "In the ordinary cases of deposits of money with banking corporations, or bankers, the transaction amounts to a mere loan or mutuum, or irregular deposit, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded."—Story on Bailments, § 80; Wray v. Tuskegee Ins. Co., 34 Ala. 58. It is insisted for the appellant, there is a distinction between a deposit with banks or bankers, and with an individual not engaged in banking. While a deposit with the one, not expressed, or shown by circumstances to have been a special deposit, will from the nature and character of the business of the depositary, and its usual course, be regarded as general, creating the relation of debtor and creditor—a deposit with the other will be presumed, in the absence of evidence to the contrary, as special, creating only the relation of bailor and bailee. The authority which is relied on to support the proposition, does not seem to assert it so broadly. The evidence of the deposit in that case, and of the agreement between the parties, was verbal, and it was shown that they stood in the relation of employer and overseer, the latter depositing bank notes with the former for safe-keeping. The relation of the parties, the expressed purpose of the deposit, the fact that the depositary was not engaged in any commercial business, were circumstances which the court held were proper for the consideration of the jury, in determining whether the deposit was general or special. Duncan v. Magette, 25 Tex. 246. Beyond this we do not understand the decision to extend, and to this extent it is consistent with our own case of Derrick v. Baker, 9 Port. 362. But neither case asserts that the character of business in which the depositary may be engaged, necessarily determines the character of the deposit.

Contracts, verbal or written, are interpreted in the light of the circumstances surrounding the parties, and their relations to each other when they are formed. These circumstances and relations, often aid materially in ascertaining the intention of the parties, and when the character of the contract is uncertain, when its expressions are inapt, may enable the court more satisfactorily to determine what are the obligations it imposes or the rights it confers. If there was nothing more in a transaction resting entirely in parol, than that a farmer, having money, should deposit with a neighbor engaged in the like and no other pursuit, or in no business requiring the frequent use of money, and the deposit was expressed to be for safe-keeping, the jury within whose province it would lie to determine whether the deposit was general or special, would probably conclude that it was special, that the purpose of the depositor was the safe-keeping of the money, and the duty and liability of the depositary was to keep safely. But if the depositary was a merchant, whose business required the frequent use of money, and he was in the habit of receiving money on deposit, there would be more hesitation in pronouncing the deposit special—that the depositary could not use the money—that the title to it remained in the depositor, and if it was lost, he must bear the loss, unless fraud or gross negligence could be imputed to the depositary.

The transaction between these parties does not rest in parol—the contracts are in writing, and if the circumstances under which they were made, the relations then existing between the parties, or any other extrinsic fact which could properly be considered, would aid in determining the character of the contracts, no evidence has been given of them. The construction they must bear, depends wholly on the terms in which they are expressed.

The first in point of time, expresses a deposit of a certain sum in gold, and that the purpose is for safe keeping, and that it is to be returned whenever called for. The gold is not shown to have been in a sealed package, in a bag, or in a box or chest, nor marked so as to be capable of being separated from other like coin, and of identification, nor is the character or denomination of the coin stated. The promise is unconditional, to return it whenever called for—there is no contingency provided by the contract, in which obedience to this promise can be excused. If the transaction was with a bank, banker, or a dealer in money, or with a merchant, or other person engaged

in business requiring the frequent use of money, and in the habit of receiving money on deposit, the presumption would be, probably, that the writing implied a general, not a special deposit. Such a deposit would be most advantageous to the depositor—the gold would cease to be his property, and if lost by any casualty, whatever may have been the diligence of the depositary, the obligation to repay it in kind would be absolute. The presumption would also be consistent with the course and usages of business.—Dawson v. Real Estate Bank, 5 Pike (Ark.), 297; Foster v. Essex Bank, 17 Mass. 479 (9 Am. Dec. 168); Commercial Bank v. Hughes, 17 Wend. 94. The writing expressing that the purpose of the deposit was safe keeping, would scarcely be sufficient to repel the presumption. But we are without the aid of evidence of the character of the business in which the depositary was engaged, or of any extrinsic fact which would aid in the construction of the writing. Every clause and word of a contract, must have assigned to it some meaning if possible and it is not to be presumed parties have deliberately or carelessly employed idle, unnecessary, or unmeaning words and expressions. Construing the instrument by its words alone, we conclude that the safe keeping of the gold was the purpose of the deposit, and the duty imposed was safely to keep, and to return in individuo when demanded. The deposit was therefore special, not general.

The other writing is in form of a receipt, and expresses the gold is payable on demand. The only duty imposed is the payment on demand. There is not, as in the former writing, an express agreement to keep safely, nor any words which are inconsistent with a loan, payable on request. That the money is stated to be received on deposit, was, most probably, intended to indicate that it was not a loan bearing interest. Giving due significance to all the words of the writing, and that its terms import a payment, not a return of the identical money, the contract is not a bailment, but a loan of money, payable presently or on request—a written promise for the payment of a certain sum of money, absolutely and unconditionally, imposing no other duty or obligation than payment, is a promissory note.—Woodfolk v. Leslie, 2 Nott & Mc. 585. A promissory note, or other writing for the payment of money on request, or presently, or on demand, is subject to the statute of limitations, and the bar of the statute is computed, not from the day of demand, but from the date of the note or writing.—Ang. Lim. § 95; Owen v. Henderson, 7 Ala.

641; McDonnell v. Br. Bank, 20 Ala. 313; Kimbro v. Waller, 21 Ala 376. In all its material features, the writing we are construing is not distinguishable, in legal effect, from that which was considered in Owen v. Henderson, *supra,* and held from the day of its date, within the operation of the statute of limitations. Adhering to that decision, we must pronounce that the action, so far as founded on this instrument, was within the bar of the statute. The oral declarations made by Winston in 1869, if clearly proved, and if regarded as an unqualified admission of an existing liability, embracing the last instrument, which he was willing to pay, would not remove the bar of the statute, or prevent it from attaching subsequently. The bar of the statute can be avoided only by a partial payment before the bar is complete, or an unconditional promise in writing.—Code of 1876, § 3240.

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## TINKHAM v. HEYWORTH.

(Supreme Court of Illinois, 1863, 31 Ill. 522.)

E. I. Tinkham & Co. were bankers in the city of Chicago, and in the usual course of their business as such, collected notes, bills, drafts, etc., for their customers. Heyworth, the appellee, who was doing business in the same city as a merchant, under the name of J. O. Heyworth & Co., was a customer of these bankers, and kept a deposit account with them, drawing his money out as occasion required. While this relation existed between the parties, Heyworth placed in the hands of the bankers a demand for $103.10 against one Tewksbury, for collection.

The bankers collected the amount from Tewksbury, and placed it to the credit of Heyworth; under his firm name of J. O. Heyworth & Co.

The bank deposit book of Tinkham & Co. showed an account between the parties, which was balanced January 11, 1861, and there was entered as the last item, "March 13, 1861, Dr. to coll. G. D. Tewksbury, 103.10."

On the 11th February, 1862, Heyworth made demand of the amount so collected for him by Tinkham & Co., and they refused to pay it over.

It was the general and universal custom in Chicago for bankers to pass all collections for customers to their credit, like any other deposit, and this was so in the case of a single collection for a party not previously a customer or depositor.

On this state of facts, Heyworth, on the 20th of February, 1862, commenced an action of "trespass on the case" in the court below, against Tinkham & Co., to recover the amount collected by them upon the demand which he had placed in their hands against Tewksbury. Such proceedings were had in that suit, that the plaintiff recovered a judgment against the defendants, from which they took this appeal.

The assignment of errors presents the question, whether an action on the case will lie against bankers who fail to pay over money which they have collected for others. . . .

CATON, C. J. Were this action against an attorney for not paying over money collected, we should not hesitate to hold that case would lie. We think it is different in the case of a bank. Different duties and different rights arise in the two cases. The bank receives no fee for its services, but only the use of the money until it shall be called for by the creditor, while the attorney is entitled to a direct reward, and has no right to use the money at all, but must pay it over to his client immediately, without demand. Money thus collected never becomes the attorney's money, he had no right to make himself the debtor of the client by crediting him with the amount, while the bank may place the money in its vaults as its own, and credit the customer with the amount, and thereby become the debtor of the customer, the same as in case of an ordinary depositor, and this, whether the customer keeps an ordinary account with the bank or not. Such is the universal custom with banks, and if we may not take notice of this custom, it was abundantly proved on this trial. When the money is thus credited by the bank, it assumes every responsibility for its safety, while this is not the case with an attorney. In many respects, the undertaking is very different in the two cases.

When this money was collected and placed to the credit of the plaintiff, the only relation between the parties was that of debtor and creditor, and the form of the action should have conformed to that relation. We think an action as for a tort would not lie.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

## DAILY v. BUTCHERS' & DROVERS' BANK OF ST. LOUIS.

(Supreme Court of Missouri, 1874, 56 Mo. 94.)

VORIES, J. . . . There is no difficulty in reference to the facts in this case; all of the material facts stand admitted. The question is as to the law growing out of the facts admitted. The plaintiff being the owner of certain drafts drawn on certain persons in the States of Mississippi and Arkansas and being a customer of the defendant (a bank in St. Louis, Mo.), deposited these drafts with the defendant for collection. The defendant forwarded the drafts to the National Bank at Vicksburg, in the State of Mississippi, for collection. The drafts were indorsed by the cashier of defendant to the cashier of the National bank at Vicksburg, for collection for account of Butchers' and Drovers' Bank of St. Louis. The Vicksburg bank collected part of the drafts and shortly afterwards failed and became insolvent without ever paying or otherwise accounting to defendant for the money collected or the drafts uncollected. There is no pretense that the defndant had not used due diligence in selecting the Vicksburg bank as a collecting agent, it being solvent at the time the drafts were forwarded. After the Vicksburg bank became insolvent, the plaintiff demanded the money collected by the Vicksburg bank and the drafts uncollected, of the defendant. The defendant failed to pay the money or deliver the drafts, and the plaintiff commenced this action to recover the amount thereof.

The question is, is the defendant liable for the amount of these drafts in this action, or, in other words, was the Vicksburg bank the agent of the plaintiff for the collection of these drafts, or was it the agent of the defendant? This has for a long time been a vexed question in the commercial world, the decisions on the subject being conflicting both in England and in this country. In the State of New York, although the decisions on the subject have not always been entirely consistent, it is now well settled that, where a bank in that State receives for collection a draft payable in another State, and forwards the draft to a correspondent in the place where the draft is payable, the bank receiving the draft for collection is

responsible to the owner; that such correspondent is the agent of the bank transmitting the draft and not the sub-agent of the owner of the draft. (Allen v. Merchants' Bank, 22 Wend. 215; Commercial Bank v. Union Bank, 1 Kern., 203). And the same rule is adopted in the States of Ohio and Indiana, and perhaps in some other States. (Reeves v. The State of Ohio, 8 Ohio St. 465; American Express Co. v. Haire, 21st Ind. 4). . . .

In the States of Massachusetts, Pennsylvania, Connecticut, Illinois, and in several other States, the decisions are in direct conflict with those in New York and Ohio referred to. In the case of Bellemire v. Bank of United States (4 Wharton, 105), it was held that the bank should be regarded as having undertaken to collect the note in the customary mode, and the holder of the note must be understood to have consented to the arrangement; consequently, on default of payment by the maker, it became the duty of the bank to call to its aid the notary and intrust him with the performance of that which was necessary to secure the responsibility of the indorsers; that the notary being a public officer, he and his sureties on his official bond were liable to the parties injured by his neglect or misconduct, and not the bank or person who directly employed him. . . .

These cases are not all exactly alike in reference to their particular facts, but the principle involved is deemed to be the same. They are governed by one general idea, which is, that it is the universal custom and habit for banks which receive notes and drafts for collection, the payer of which resides at a distance, to transmit the same to some bank or agency at the place of payment and that therefore, when the holder of a bill or draft in such case deposits the same with a bank for collection, without instructions to the contrary, he is presumed to do so with reference to such usage and to authorize the bank to transmit the bill or draft accordingly. And when the collecting bank uses due diligence and good faith in selecting a correspondent or bank at the place of payment, to whom the bill or draft is transmitted, it has discharged its whole duty, and this, notwithstanding the draft is indorsed to the agency to which it is transmitted, for collection on account of the collecting bank. Of course in such cases if the bank or other agent, to whom the draft was transmitted, should collect the draft and pay over the proceeds to the first bank or to its order without notice to the contrary from the real owner, the bank to which

it was transmitted would be discharged from further liability, and the first bank with which the bill was deposited would be liable to the owner for the proceeds. . . .

The judgment of the Circuit Court will be affirmed. The other judges concur.

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## SIMPSON v. WALDBY.

(Supreme Court of Michigan, 1886, 63 Mich. 439.)

MORSE, J. . . . From a careful perusal of the entire charge it does not appear that the jury were instructed upon the precise theory of the plaintiff's claim. He claims that he had nothing to do with the selection of the St. Albans Bank as a medium through which to collect the drafts upon Rixford; that such bank was chosen by the defendants, and was their agent, not his, and it was contended, under his evidence of the transaction, that the defendants were responsible for the loss of the money occasioned by the failure of the St. Albans Bank.

It will be seen that the circuit judge charged the jury what the law would be, in the absence of any agreement, if Simpson requested the drafts to be sent to the St. Albans Bank, but is silent as to what would be the result if the defendants themselves selected this bank, without any agreement as to who should bear the loss, if any.

The counsel for the defendants contend here, as they did below, that in the case of collections, like this, where there is no special agreement, the home bank is only responsible for the use of ordinary care and prudence in the selection of the agencies through which it attempts the collection. This is undoubtedly the purport and meaning of the instructions of the court below, taken as a whole, to the jury.

The question is therefore directly before us, what is the law of the case when a person steps into a bank, in the ordinary course of business dealing, and intrusts to it the collection of a draft drawn upon some person residing at a distance, in case the home bank, through the failure or dishonesty of another bank, selected by itself, never received the money upon such draft, though the same is paid by the drawee?

In the absence of any agreement in regard to the matter, who must bear the loss, in case the home bank has not been at fault in the selection of its agent or agents?

There is a conflict of authority upon this proposition; and, as it has never been settled in this State, we must be guided and governed in our action by what seems to us the most correct view in justice and on principle.

Is is held in New York, Indiana, Ohio, and New Jersey that the home bank must be the loser, upon the principle that such bank undertakes the collection of the draft or bill, and selects its agent or agents, and must be responsible for their default or neglect, as it would be for the default or neglect of its officers or clerks in the collection of a house bill, or as a contractor would be bound to answer for any negligence or default of his subcontractors or workmen in the performance of his contract. Allen v. Merchants' Bank of New York, 22 Wend. 215; Reeves v. State Bank of Ohio, 8 Ohio St. 465; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588; Ayrault v. Pacific Bank, 47 N. Y. 570; Abbott v. Smith, 4 Ind. 452; Tyson v. State Bank, 6 Blackf. 225.

In other states it is adjudged that the customer depositing the draft for collection must be presumed to know, and contract upon the knowledge, that in the ordinary course of business the home bank must employ correspondents or agents abroad to make the collection and transmit the money collected. The holder or maker of the draft, having full notice of the usual course of business, must be held to assent thereto.

"He therefore authorizes the bank with which he deals to do the work of collection through another bank." "The bank receiving the paper becomes an agent of the depositor, with authority to employ another bank to collect it. This second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such agent to make the collection."

If, therefore, there is no want of ordinary care and prudence in the selection of the subagent, and no negligence or fault on the part of the home bank, the customer must be the loser for the default or negligence of such subagent who is regarded as his agent. Guelich v. National St. Bank of Burlington, 56 Iowa, 434. . . .

Nearly all the cases cited above, in support of both sides of the question, relate to transactions by which the draft or bill failed of

collection by neglect of the notary to make demand in time, or proper protest, or default of the agent in not moving quick enough to make the money.

In the case at bar the draft was collected of the drawee, and the loss of the money resulted from the failure of the St. Albans Bank, before the collection of its draft transmitting such money to defendants. If defendants were negligent or in fault in not immediately forwarding such draft to New York, upon its reception by them, or in its presentation there, they are, in my opinion, liable to plaintiff for the money; but, if there was no negligence in either of these respects, the question arises, who must bear the loss on account of the inability of the St. Albans Bank to meet its draft transmitting the money? . .

In Mackersy v. Ramsays (in the house of lords), 9 Clark & F. 818, the same doctrine is maintained. Mackersy employed bankers in Edinburgh to obtain for him payment of a bill drawn upon a person in Calcutta. The bankers accepted the employment, and wrote him, promising to credit him with the money when received. They transmitted the bill, in the usual course of business, to bankers in London, and by them it was forwarded to India, where it was duly paid. The bank in India that collected the money failed, and the Edinburgh bankers did not receive it. They, however, wrote to the drawer of the bill, announcing the fact of its payment, but never actually credited him with the amount thereof on their books. Held, that the Edinburgh bankers were the agents of the drawer to obtain payment of the bill; that, payment having been actually made, they became *ipso facto* liable to him for the amount received, and that he could not be called upon to suffer any loss occasioned by the conduct of their subagents, between whom and himself there existed no privity. . .

The learned jurists holding otherwise all admit that, if a person inintrusts a home draft or bill to a bank for collection, such bank is responsible to the customer for any negligence or default of its agents, officers, or employees. I cannot see why any different rule should prevail in the collection of a foreign bill. It is in every case that I have examined sought to be maintained upon the theory that the customer knows the bank must act through some other person or persons at a distance, and therefore, impliedly, from the very nature of the course of business, assents to the employment of such persons, and makes them his agents. This reasoning does not strike me as

sound. If I leave an indorsed note against persons in my own town for collection, and consequent demand and protest, I know that some agent or employee of the bank will do the work, or some part of it, and I do not know or inquire who will do it. I contract, however, with the bank that suitable agents will be employed, and hold it responsible for their acts. The law authorizes me to do this.

If I intrust the same bank with the collection of a foreign draft, I also know that they will employ some agent or correspondent abroad, of their selection, not mine, of whom I know nothing, and with whom they are supposed to have business relations. I do not inquire whom they are to select. I presume, and have a right to presume, that they have business knowledge of such agent or agents, which I do not and cannot possess, by the very course of their dealings as bankers.

In each case the bank holds itself out, for a consideration, to collect my paper, and it can make no difference whether the compensation is great or small. In each case it selects its own agents in the premises. In each case I have no part in or control over such selection. In each case there is no privity between the party selected and myself. . . .

It has been said by some of the courts that the holding of banks liable for the default and neglect of their correspondents in a case like the present would render the collection of bills and drafts of this nature extremely difficult, and that it would tend very much to destroy the facilities which at present exist, and subject the holders of bills to inconvenience and expense, and probably, in many cases, to serious loss.

But as long as banks and bankers or other persons hold themselves out to collect such bills or drafts for a compensation, or their advantage, they ought to be governed by the same rules of law that apply to other persons, and, if they wish to avoid such responsibility, it is very easy for them to accept such business only upon a special agreement as to their duties and liabilities. Failing to do this, I think they must, in taking such bills or drafts, be responsible, as other business men are, for the misconduct of their selected agents at home or abroad. . . .

## ZEIDEMAN v. MOLASKY.

(Missouri Court of Appeals, 1906, 118 Mo. App. 106, 94 S. W. 754.)

Nortoni, J. The action is for money had and received. . . . It therefore appears from the petition that respondent is trustee of an express trust in so far as appellant's earnings and their increments arising out of the several periods of employment since her majority, are concerned. Now this action is for money had and received and such form of action is a proper remedy by the *cestui que trust* against the trustee of an express trust only when the trust is fully executed and the amount settled and there is nothing to do but for the trustee to pay over the amount to the *cestui que trust*. An action at law for money had and received will not lie when the trust is still open, nor until the final account is settled and a balance ascertained. (Case v. Roberts, 1 Holt's N. P. C. 501; 2 Perry on Trusts (5 Ed.), sec. 843; 22 Amer. and Eng. Ency. Pl. and Pr. (2 ed.), 137-138; Frost v. Redford, 54 Mo. App. 345.) From the allegations of the petition relative to the relations between the parties other than those arising out of the alleged guardianship, it appears that there has been no settlement or ascertainment of the alleged account; in fact, it appears that the funds alleged to be the subject of the trust are in no manner ascertained. Such funds arise out of a contract of hire in which the compensation was not even agreed upon. No prior contract is shown whereby any certain amount is to be allowed appellant as her compensation and invested for her benefit, and in truth, it affirmatively appears that no settlement or ascertainment of the alleged trust account has ever been had between the parties. Wherefore, it is plain that the action for money had and received will not lie, under the circumstances stated, for the amount that may be due appellant by virtue of the several employments, her wages and increments since her majority, the remedy being by bill in equity to obtain an accounting therefor. . . .

## DOYLE v. MURPHY.

(Supreme Court of Illinois, 1859, 22 Ill. 502.)

WALKER, J. . . . . By the defendants in error, it is insisted that Maurice Doyle was a trustee, and being such, a court of equity has undoubted jurisdiction over the trust fund. That the court has such a jurisdiction in cases of strict trust, there is no doubt. But it does not therefore follow, that the court will assume jurisdiction in every case where a mere confidence has been reposed, or a credit given. The various affairs of life in almost every act between individuals in trade and commerce, involve the reposing of confidence or trust in each other, and yet it never has been supposed that because such a confidence or trust in the integrity of another has been extended and abused, that therefore, a court of equity would in all such cases assume jurisdiction. When one person sells property on credit, or loans money to another, confidence is reposed and a trust is entertained that the money will be paid by the debtor, and yet no case has gone so far as to hold, that it was such a trust, as gave to a court of equity jurisdiction under the head of trusts. If this were so, there would be no case where property or money was obtained on a credit, in which the court would not have jurisdiction. But on the other hand, when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust is thereby created, as authorized the court of equity to entertain jurisdiction, to compel its application to the purposes of the trust. And the property may be pursued into the hands of all persons who have obtained it with notice of the trust, or where it has been converted into money, the money may be recovered, or where the money arising from the sale of trust property or funds, has been invested in other property, a court of equity will compel the trustee to account for the property thus acquired, and treat it in every respect as if it were the original trust property. In this case the bill alleges and one of the complainants swears, that money was delivered to Maurice Doyle to pay certain debts of Catherine Byrne, which he failed to so apply. If he failed to pay this money, there was such a breach of contract, as would have authorized

Catherine Byrne to maintain an action for money had and received, and probably the creditors to whom the money should have been paid might have maintained the action. But according to no rule or adjudged case that we are aware of, was it a trust fund, authorizing Mrs. Byrne or her representatives to recover as a trust fund. If it was a trust fund, it was such for the benefit of her creditors, and they would alone have had the right to pursue it in equity, and her representatives have no better or greater right than she held. . . .

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## McFADDEN v. JENKYNS.

(In Chancery, 1842, 1 Phillips 153.)

The Lord Chancellor. This was an appeal from a judgment of Vice Chancellor Wigram, upon a motion for an injunction to stay proceedings at law. The facts stated in support of the motion were shortly these. The testator, Thomas Warry, had lent a sum of 500 pounds to the defendant Jenkyns, to be returned within a short period. Some time afterwards Warry sent a verbal direction to Jenkyns to hold the 500 pounds in trust for Mrs. McFadden. This he assented to, and, upon her application, paid her a small sum, 10 pounds, in respect of this trust. The main question was, whether, assuming the facts to be as stated, this transaction was binding upon the estate of Thomas Warry. The executor had brought an action to recover the 500 pounds so lent to Jenkyns. It is obvious that the rights of the parties could not, with reference to this claim, be finally settled in a court of law; and, if the trust were completed and binding, an injunction ought to be granted.

Some points were disposed of by the Vice-Chancellor in this case, which are indeed free from doubt, and appear not to have been contested in this Court, viz. That a declaration by parol is sufficient to create a trust of personal property; and that if the testator Thomas Warry had, in his lifetime, declared himself a trustee of the debt for the Plaintiff, that, in equity, would perfect the gift to the plaintiff as against Thomas Warry and his estate. The distinctions upon this subject are undoubtedly refined, but it does not appear to me that there is any substantial difference between such a case and the

present. The testator, in directing Jenkyns to hold the money in trust for the Plaintiff, which was assented to and acted upon by Jenkyns, impressed, I think, a trust upon the money which was complete and irrevocable. It was equivalent to a declaration by the testator that the debt was a trust for the plaintiff.

The transaction bears no resemblance to an undertaking or agreement to assign. It was in terms a trust, and the aid of the court was not necessary to complete it. Such being the strong inclination of my opinion, and corresponding, as it appears to do, with that of the learned Judge in the court below, and with the decision of the Master of the Rolls in the case to which he refers, I cannot do otherwise upon this motion, and in this stage of the cause, than refuse the application. . . .

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## PORTER v. JACKSON.

(Supreme Court of Indiana, 1883, 95 Ind. 210.)

ZOLLARS, J. The will of William Jackson was probated in 1869. By this will, the testator gave to his wife all of his property, real and personal so long as she should remain his widow. Upon her marriage or death the property was devised to his seven children, one-seventh to each. The will contained the following provision: "I further will that, as a condition of the acceptance of the property thus devised to my heirs, they, on their part, shall support and maintain Eliza Andrews, during her natural life, or until she shall marry." . . .

The will, as we have seen, provides that as a condition of the acceptance of the property devised, the devisees shall support and maintain Eliza Andrews. The rule is well settled that, where real estate is devised to the person who, by the will, is directed to pay a legacy, such legacy is an equitable charge upon the real estate so devised. Lindsey v. Lindsey, 45 Ind. 552; Wilson v. Piper, 77 Ind. 437; Cann v. Fidler, 62 Ind. 116; Wilson v. Moore, 86 Ind. 244; Castor v. Jones, 86 Ind. 289; Nash v. Taylor, 83 Ind. 347.

This is conceded by counsel in this case. It is further conceded, in argument, that as the will was probated and of record, and as Eliza

Andrews was not a party to the partition proceedings, the equitable charge for her support was not destroyed by the sale to appellant.

We think it equally clear that the acceptance of the property, under the will, imposed a personal obligation upon the devisees to furnish the support to the legatee, and that she may enforce that obligation by a suit, and recover a personal judgment. The acceptance of the property under the will implied a promise to furnish the support. That support seems to have been the consideration for the property devised. It is expressly made the condition to the vesting of the title to the property. It seems to be plain that the testator intended to impose a personal charge upon the devisees.

In the case of Harris v. Fly, 7 Paige, 421, which arose under a will similar to that under consideration, Chancellor Walworth, in speaking of the legacy, and the liability of the devisee said: "By the will, the payment thereof is charged upon him personally; and he has received the land as an equivalent for the payment thereof, although for the protection of the rights of the legatees, this court gives them an equitable lien upon the land itself as an additional security. This case was cited and approved by this court in the case of Lindsey v. Lindsey, supra. The same doctrine was held in the case of Cann v. Fidler, supra. . . .

Under the provisions of the will, and in the light of the above authorities, we think it is very clear that the devisees are personally bound to furnish to Eliza Andrews the support provided in the will, and that she may enforce that liability by suit, even beyond the value of the land devised if necessary, and without resorting to the land at all, if the amount can be made by such suit or suits. Whether the devisees could compel her to thus resort to their personal liability before having resort to the land, if they still own it, we need not decide.

We think it clear also that the charge upon the land remains an equitable charge upon the fund in the hands of the commissioner and in the custody of the court, and that she may enforce that charge. Especially is this so, as the devisees are liable beyond the value of the land, and are insolvent. She may enforce the personal liability against the devisees, and still look to the land if necessary. See analogous cases, Gimbel v. Stolte, 59 Ind. 446; Clyde v. Simpson, 4 Ohio St. 445; Milligan v. Poole, 35 Ind. 64; Harris v. Fly, *supra.*

## WHITEHOUSE v. CARGILL.

(Supreme Court of Maine, 1896, 88 Me. 479, 34 Atl. 276.)

FOSTER, J. The father of the plaintiff devised certain real estate to his son, and in his will directed that the son pay to the plaintiff five hundred dollars when she should become twenty-one years of age.

The father died November 10, 1871, and his will was duly admitted to probate.

The defendant was appointed guardian of the plaintiff in 1873, and continued to be her legal guardian till she arrived at the age of twenty-one years in 1890.

On October 2d 1876, the son conveyed by warranty deed the real estate to this defendant.

This real estate, upon a former bill in equity, brought by the plaintiff against the defendant, was charged with the payment of said legacy (Whitehouse v. Cargill, 86 Maine, 60), and by a decree of the court was sold by the master and the proceeds, amounting to $143, was paid to the plaintiff.

After the termination of defendant's guardianship he procured an insurance of five hundred dollars on the store which was a part of the real estate conveyed to him by his warranty deed from the testator's son. The store was burned and defendant collected the insurance.

The present case raises two questions: (1) Is the defendant accountable to the plaintiff for the insurance which he procured in his own name, and has collected? (2) Is he accountable to the plaintiff for the rents and profits of the real estate prior to the sale by the master?

Both questions we think must be answered in the negative.

When the real estate was sold by the master and the proceeds paid to the plaintiff, her remedy against this defendant was exhausted, unless there might be a remedy upon the guardian's bond.

The nature of the plaintiff's claim upon the real estate was a lien thereon for the payment of her legacy, enforceable in equity. Merritt

v. Bucknam, 77 Maine 253; Same v. Same, 78 Maine, 504; Taft v. Morse, 4 Met. 523; Thayer v. Finnegan, 134 Mass. 62.

The contract of insurance is one of indemnity only. The defendant had an insurable interest, and could recover only to the extent of his loss. The contract of insurance does not run with the land, and is an agreement to indemnify the assured against any loss which he may sustain, and not any loss incurred by another having an interest as mortgager, redemptioner, attaching creditor or otherwise. Cushing v. Thompson, 34 Maine, 496; White v. Brown, 2 Cush. 412; Donnell v. Donnell, 86 Maine, 518.

There was no privity of contract in fact or law between the plaintiff and the defendant by which this insurance, placed by the defendant at his own expense and upon his interest, should be held under the lien that existed upon the real estate. Donnell v. Donnell, supra; McIntire v. Plaisted, 68 Maine, 363; Cushing v. Thompson, 34 Maine 496; White v. Brown, supra.

The plaintiff had an equitable lien upon the estate, a charge upon it rather than any title to or legal estate in it. Taft v. Morse, 4 Met. 523; Merritt v. Bucknam, 78 Maine, 504, 507; Bailey v. Ekins, 7 Ves. 323; Gardner v. Gardner, 3 Mason, 178.

The holder of an equitable lien, with no legal estate, cannot call the owner of the legal estate to account for the rents and profits received by him while occupying the premises.

Bill dismissed.

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## CHAPMAN v. SHATTUCK.

(Supreme Court of Illinois, 1846, 8 Ill. 49.)

Treat, J. This was an action of debt commenced by Chapman against Shattuck. The declaration was on an appeal bond in the penalty of seventy-one dollars. At the return term, Shattuck moved to dismiss the case and filed a stipulation signed by him and Chapman, stating that the suit had been settled, and agreeing that it should be dismissed at the cost of Shattuck. The motion was resisted by W. T. Burgess, Esq., the plaintiff's attorney. He read an affidavit, alleging in substance that it had been agreed between him and his client that

a balance of seven dollars, due him for services as attorney in this and a former case, should be paid out of the proceeds of the judgment to be recovered in this suit. That before the date of the stipulation to dismiss, he notified Shattuck of the agreement between him and his client; and that the settlement was made without his knowledge or consent. The circuit court dismissed the case according to the terms of the stipulation. That decision is now assigned for error.

It is insisted that Burgess had such an interest in the subject-matter of the suit, as to preclude the parties from compromising it without providing for the payment of the amount due him. If this position sion (?) can be sustained, it must be on the ground that he was the equitable assignee of the chose in action, on which the suit was instituted. The doctrine is now well settled, that courts of law will recognize and protect the rights of the assignee of a chose in action, whether the assignment be good at law, or in equity only. If valid in equity only, the assignee is permitted to sue in the name of the person having the legal interest, and to control the proceedings. The former owner is not allowed to interfere with the prosecution, except so far as may be necessary to protect himself against the payment of costs. After the debtor has knowledge of the assignment, he is inhibited from doing any act which may prejudice the rights of the assignee. Payment by him to the nominal creditor, after notice of the assignment, will be no defence to an action brought for the benefit of the assignee. Any compromise or adjustment of the cause of action by the original parties, made after notice of the assignment, and without the consent of the assignee, will be void as against him. Andrews v. Becker, 1 Johns. cases, 411; Littlefield v. Story 3 Johns, 426; Raymond v. Squire, 11 do. 47; Anderson v. Van Allen, 12 do. 343; Jones v. Withe, 13 Mass. 304; Welch v. Mandeville, 1 Wheaton, 233; McCullom v. Coxe, 1 Dallas, 134. A partial assignment, however, of the chose in action, will not suffice to bring the case within the principle. The whole cause of action must be assigned. It was well remarked by Justice Story, in Mandeville v. Welch, 5 Wheaton, 277, that "a creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into payments. When he undertakes to

pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons. In the case before us, it is not pretended that there was an assignment of the entire cause of action. By the terms of the agreement, Burgess was only to receive a portion of the proceeds of the bond. This gave him no power over the suit. Chapman had not so parted with his interest in the bond as to lose his right to control it. Shattuck was not bound to notice the claim of Burgess. The parties to the record were at full liberty to compromise the case, and having done so, the circuit court did right in carrying their stipulation into effect. The judgment of the circuit court is affirmed with costs.

Judgment affirmed.

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## STONE v. PRATT.

(Supreme Court of Illinois, 1860, 25 Ill. 16.)

Caton, C. J. On the 23rd of September, 1852, A. Pratt, by indenture, agreed to sell and convey to D'Wolf, or his assigns, several parcels of land for the gross sum of four thousand and fifty dollars, all on time except one hundred dollars; and D'Wolf, by the same instrument, agreed to pay the purchase money as therein stipulated.

On the 15th of January, 1853, Stone purchased of D'Wolf fifteen acres, part of the premises which Pratt had sold and agreed to convey to D'Wolf. . . .

Stone, insisting that by the purchase of the contract, he was entitled to recover the money due thereon in place of Pratt, and that Pratt was thereby in effect fully paid the purchase money for which he had agreed to convey the premises sold to D'Wolf, filed this bill to compell Pratt to convey to him the fifteen acres, which he had purchased of D'Wolf, parcel of that which D'Wolf had bought of Pratt. . . .

It is a well settled rule of law, that an entire contract cannot be divided so as to compel a party to perform it in parcels, either to different persons or at different times. When D'Wolf sold a part of the premises to Stone, he could not thereby impose the legal obligation upon Pratt to convey that portion to Stone, and the balance to him-

self. That would be making it in fact two contracts instead of one. It was asking him to make satisfaction to two instead of one. In case of disagreement it exposed him to two prosecutions instead of one, and required him to make two deeds instead of one. This is a hardship which the common law will never allow to be imposed upon a promisor or an obligor. Nor is this principle of the common law ignored by courts of equity, although in exceptional cases they will overlook it, where it is necessary to protect the rights of an innocent, fair and *bona fide* purchaser against a contemplated fraud. . . .

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## JAMES v. NEWTON.

(Supreme Court of Massachusetts, 1886, 142 Mass. 366, 8 N. E. 122.)

Field, J. The assignment in this case is a formal assignment, for value, of "the sum of six hundred dollars now due and to become due a contract for building a grammar school-house and it is agreed that and payable to me" from the city of Newton, under and by virtue of sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same." There is no doubt that it would operate as an assignment to the extent of $600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto,* unless it is accepted by the person on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment, except against the assignor if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the city of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of the money reserved as a guaranty by said city;" and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to an assignee of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignment of choses in action made without

the assent of the debtor, but for a long time they have recognized and enforced assignments of the whole of a debt, by permitting the assignee to sue in the name of the assignor, under an implied power, which they hold to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is wholly a question of procedure, although the common law procedure is not adapted to determining the rights of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor cannot sue his debtor for a part of an entire debt, and, if he brings such an action and recovers judgment, the judgment is a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. Warren v. Comings, 6 Cush. 103.

It is said that, in equity, there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that, as between assignor and assignee, there may be such an assignment. The law that, if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee as the consideration of the debtor's promise to pay the assignee, and that by this promise the indebtedness to the assignor is *pro tanto* discharged. It has been held, by courts of equity which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants according to their rights, as between themselves; and the rule against partial assignments was established for the benefit of the debtor. Public Schools v. Heath, 2 McCarter, 22. Fourth National Bank v. Noonan, 14 Mo. App. 243.

In many jurisdictions, courts of equity have gone farther, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill brought by the assignee against the debtor and assignor while the debt remains unpaid. The procedure in equity is

adapted to determining and enforcing all the rights of the parties, and the debtor can pay the fund or debt into court, have his costs if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone still farther, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and, if he does, that this is no defence to a bill by the assignee. The doctrine carried to this extent effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule, he cannot, if he have notice or knowledge of an assignment of any part of it.

It may be argued that, if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that, if this is so, it follows that, after notice of the assignment, the debtor cannot rightfully pay the sum assigned to the assignor. . . .

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## TYSON v. JACKSON

(In Chancery, 1861, 30 Beav. 384.)

The Master of the Rolls. I think the decree in this case is a matter of course. The testator died in 1832; he bequeathed five legacies of £200 each to his grandchildren, one of them being given to Mira Ella Clark. In 1858, she and her husband assigned it to the plaintiff, who now requires payment; and, if there is no bar by lapse of time, it would be a matter of course that that legacy should now be paid. It appears that Holmes alone proved the will, he got in all the assets, he passed his residuary account at the Stamp Office, and paid over the the residue, after deducting the duty, to the residuary legatee. If the case stood there, could the executor, apart from the question of time, afterwards dispute the right of legatee to receive the legacy? Could he require the legatee to take an account of the estate or to go against

the residuary legatee? It is clear, when an executor retains the money for payment of the legacy, that he becomes, as in the case of Phillipo v. Munnings, 2 Myl. & Cr. 309, a trustee of that particular fund or sum of money so retained distinct from his character of executor. It is as distinct as if the testator had directed his executor to pay the legacy over to A. B. in trust for a legatee, and it had been actually paid over; A. B. would then be a trustee for the legatee. So here, the executor who has retained that sum of money is in exactly the same situation.

But it does not end there, for in the residuary account which the executor passed in July, 1835, he actually signed a document, stating that he had "retained in trust, on the 23rd day of June, 1835, the sum £1,000 for the five legatees (mentioning them) being the five legacies out of the personal estate above mentioned, having first allowed or paid £10 for the duty thereof." I should be overruling Phillipo v. Munnings and all similar cases, if I held, that after signing this document stating that he was a trustee, and after paying over the balance to the residuary legatee, the executor was not a trustee for these legatees.

But the case does not even end there, for the executor pays the interest upon the legacy down to his death in November, 1840, and the bill is filed in March, 1860, within twenty years. But, independently of this, there is a distinct and clear trust, which time will not bar, and upon which the Statute of Limitations has no effect at all.

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## SECTION II. ESSENTIALS TO THE CREATION AND EXISTENCE OF THE TRUST RELATION

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### ALDRICH v. ALDRICH.

(Supreme Court of Massachusetts, 1895, 172 Mass. 101, 51 N. E. 449.)

The bill alleged that the testator died on March 14, 1895, leaving a will by which he gave "all the rest and residue of my estate, after the payment of debts," to his wife. After appointing her executrix, and

requesting that she be exempt from giving sureties on her bond and be not required to file any schedule of property in the Probate Court, he proceeded, "I give all my estate to my said wife to the end that she may be able to maintain a home for herself, and one where she can receive all our dear children, as we have been accustomed to do during our joint lives. I am confident she will manage with good discretion and fidelity what is committed to her, and that when she shall no longer need the property it will be equally divided among all our children, or their representatives." . . .

MORTON, J. If the testator had intended to create a trust in favor of his children at his wife's death, there can be no doubt that he knew how to do it in clear and unmistakable terms, and it is almost inconceivable that, if such was his purpose, he should have expressed himself in the manner in which he has done.

There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it. Hess v. Singler, 114 Mass. 56. Lambe v. Eames, L. R. 10 Eq. 267; S. C. 6 Ch. App. 597.

In the present case there is what clearly would constitute in law, if it stood alone, an absolute gift of the estate to the wife. Then follows, after one or two intervening clauses, the one on which the plaintiff relies. This was intended by the testator, it seems to us, to express his reason for the gift to his wife and his confidence in her, and not to cut down or affect the absolute character of the gift which he had previously made to her. It is true that he says in substance that he expects that the property, when she shall not longer need it, will be divided equally between the children and their representatives. But there is nothing which renders it obligatory on her to do this, and therefore one of the features of a precatory trust is wanting. See Warner v. Bates, 98 Mass. 274; Spooner v. Lovejoy, 108 Mass. 529; Hess v. Singler, 114 Mass. 56. . . .

The cases which we have cited do not resemble in all respects the one at bar, and there are English and American cases which seem to

support the view for which the plaintiff contends. But the question is, whether, taking the will as a whole, it was the intention of the testator to create a trust, and we are of opinion that it was not, and that the construction which we have adopted is in harmony with the more recent English and American cases.

Bill dismissed.

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## LEEPER v. TAYLOR.

(Supreme Court of Missouri, 1892, 111 Mo. 312, 19 S. W. 955.)

BLACK, J. . . . The defendant's answer admits the execution of the declaration of trust, and it proceeds upon the theory that the instrument was duly delivered to Mr. Lipscomb for the defendant's father and mother. It is useless to discuss the question of the execution and delivery of the instrument, for both are admitted by the answer.

The point is made, however that it is void for want of consideration. It may be conceded that a court of equity will not enforce an executory agreement based upon a voluntary consideration. But a settler possessed of a legal title may create a valid trust therein by a declaration that he holds the title in trust for the other person. A transfer of the title is not necessary. Bispham on Equity [4 Ed.] sec. 67. Here the trust was duly declared by an instrument in writing and under seal. It is a perfect, complete trust; and such a trust will be enforced, notwithstanding the consideration is voluntary. Lane v. Ewing, 31 Mo. 75. If a trust has been completely declared, the absence of a valuable consideration is immaterial. A perfect or complete trust is valid and enforceable, although purely voluntary. Pomeroy on Equity Jurisprudence [2 Ed.] secs. 996, 997. As this trust is perfect and complete, it must be enforced, though voluntary. But it recites a valuable consideration, and the circumstances show clearly enough that it was executed in consideration of the absolute deed of the premises previously made by the beneficiaries. But, be this as it may, the trust is perfect, and must be enforced, though based upon a voluntary consideration only. . . .

## BADGLEY v. VOTRAIN.

(Supreme Court of Illinois, 1873, 68 Ill. 25.)

This was a bill in equity exhibited in the St. Clair circuit court by August Votrain, a grandson of Etienne Deshayes, deceased, who died intestate, leaving complainant and eight other grandchildren his only heirs at law. These other eight grandchildren, together with the administrator of the intestate's estate, were made parties defendant. The bill was founded upon and sought to enforce the provisions of the following instrument in writing:

"Know all men by these presents, that I have assigned to August Votrain the sum of $12,000 of my property, which amount he is to draw before my property is divided; and he is to inherit one-third of the rest of my property, which is to be divided into three parts, after my death. The $12,000 which I have assigned to him consists of $9800 mortgages and $2200 in notes, which I have assigned upon these conditions:

First—That I retain said assigned mortgages and notes, and receive the interest thereof during my life.

Secondly—That I promise to pay said August Votrain, yearly, $200, the first payment to be made January 1st, 1872, and $200 every year thereafter.

Thirdly—These foregoing conditions are expressly understood to be upon condition that, if the said August Votrain should die before my death, the amount of property so assigned shall revert to me and remain my property as if it had not been assigned to him, and this instrument of writing shall be null and void. Belleville, Ill., September 6th, 1871.

ETIENNE DESHAYES. (SEAL).
his
AUGUST X VOTRAIN. (SEAL).
mark

C. T. Elles, witness.

The bill alleges that, March 27, 1871, the intestate was the owner and payee of five several promissory notes for divers amounts, secured by mortgage; that for the purpose of making a gift or advancement

to complainant, intestate on that day executed on the back of these several notes and mortgages an assignment, as follows:

"For value received, I hereby assign, the within note with mortgage to August Votrain, this 27th day of March, 1871.

ETIENNE DESHAYES."

But there was no proof as to the nature of this transaction or its purpose.

These notes are described and designated in the bill as "Exhibit A." The bill also alleges that, September 6, 1871, intestate was likewise owner of five other promissory notes, payable to him, for divers amounts, which are designated as "Exhibit B;" these notes had no assignment upon them. Alleges that, at his death, intestate was the owner of other personal property of the value of $1000. Complainant claims, by his bill, that, under the instrument of September 6, 1871, he is entitled to have transferred to him notes and mortgages to the amount of $12,000, and one-third of the other property of intestate, and prays that the administrator be decreed to transfer and set apart the same. . . .

McAllister, J. This case is clearly distinguishable from that of Otis v. Beckwith, 49 Ill. 121, relied on by counsel for defendant in error. In that case the subject-matter of the settlement was a policy of insurance upon the life of the settler, which was not assignable at law. The instrument of assignment contained an express declaration of trust in favor of the donor's three sons. The donor, upon executing it, gave explicit notice of the fact of the assignment and its purpose to both the assignee and the insurance company. Whereupon the former made a formal acceptance of the trust, and the latter noted the assignment in their books, in accordance with their regulations in such cases. The donor had done everything in his power essential to the completion of the transaction. The delivery of the policy to the assignee was not essential. No further conveyance from the donor was requisite. The trust was perfectly created, and nothing was required of the court but to give it effect as an executed trust.

But the case in hand differs in essential particulars. Here, there is no declaration of trust, and we are satisfied, from a careful examination of the instrument of September 6, 1871, that the donor had no intention of thereby creating the relation of trustee and *cestui que trust* between himself and defendant in error in respect to any fund or choses in action. That instrument is wholly executory in its effect,

and, aside from the promise by the donor to pay defendants $200 annually, during the donor's life, it is wholly testamentary in its nature. So far as the provision is concerned, requiring $12,000 to be paid over to defendant out of the donor's estate after his death, and then, that defendant should take one-third of the residue, the instrument purports to be, and is, a mere testamentary disposition of the donor's estate, not executed in conformity with the Statute of Wills, and we would, therefore, be no more justified in inferring an intention on the donor's part to constitute himself trustee, during his life, of the property out of which the $12,000 were to be paid to defendant, than if, instead of this instrument, he had made a will containing the same provision. These propositions we regard as clear and incontrovertible.

If, then, there is the absence of an express declaration of trust and of an intention to create one on the part of the donor in favor of defendant, what is the precise nature of the relief sought by defendant, in bringing his bill in the court below? It was to obtain the assistance of a court of equity to constitute him *cestui que trust* upon this voluntary instrument.

In Ellison v. Ellison, 6 Ves. 656 Lord Eldon said: "I take the distinction to be that, if you want the assistance of the court to constitute you *cestui que trust,* and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust,* as, upon a covenant to transfer stock, etc., if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant. But if the party has completely transferred stock, etc., though it is voluntary, yet, the legal conveyance being completely made, the equitable interest will be enforced by this court."

In the reliable elementary works, the result of the decisions is stated to be, that, if the trust is perfectly created, so that the donor or settlor has nothing more to do, and the person seeking to enforce it has need of no further conveyances from the settlor, and nothing is required of the court but to give full effect to the trust as an executed trust, it will be carried into effect, although it was without consideration, and the possession of the property was not changed. But if, on the other hand, the transaction is incomplete, and its final completion is asked in equity, the court will not interpose to perfect the settlor's liability without first inquiring into the origin of the claim, and the nature of the consideration given. Perry on Trusts, sec. 98; Adams, Eq. 6th

Am. Ed. 194-5; Lewin on Trusts, 2d Am. Ed. 134, 135; 2 Story's Eq. Jur. sec. 793a.

In McFadden v. Jenkyns, 1 Hare, 458, Sir J. Wigram, V. C., after citing all the principal English decisions, made these observations: "There may be difficulty in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled and explained upon the principle that a declaration of trust purports to be, and is, in form and substance, a complete transaction, and the court need not look beyond the declaration of trust itself, or inquire into its origin that it may be in a position to uphold and enforce it. Whereas an agreement or attempt to assign, is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the court; and where there is no consideration, the court, upon its general principles, cannot complete what it finds imperfect."

These views of that great judge seem to have been cautiously expressed, but to us they seem to be a complete exposition of the principle which ought to govern in a case like this.

So, in Beech v. Keefe, 18 Beav. 285, Sir John Romilly, Master of the Rolls, quoting from his judgment in Bridge v. Briggs, 16 Beav. 315, says: "If a person, possessed of stock, execute a declaration of trust of that stock in favor of a volunteer, he would, I apprehend, clearly constitute himself a trustee for the volunteer, and equity would execute the trust and compel a transfer of the stock to the *cestui que trust*. But if the same person executed an assignment of the stock in favor of the volunteer, and no transfer of the stock took place, this, I apprehend, would as clearly be considered to be no more than an imperfect gift, in which the donor had not done all that was in his power to do, and the donee would get no assistance from a court of equity to compel a transfer of the stock."

Now, here, as we have seen, there was no declaration of trust, and the very nature of the instrument precludes the idea of an intention on the part of the donor to create the relation of trustee and *cestui que trust* between him and defendant in error.

The substance of the transaction is, that the donor executed an assignment of $12,000 out of his estate, in favor of a volunteer, and provided for its payment, after his death, out of promissory notes payable to himself, some of which were secured by mortgages upon real estate. These notes were capable of legal transfer, but only in the mode pre-

scribed by our statute, viz: by indorsement on the back by the payee, and delivery. It could not be done by a separate instrument. Ryan v. May, 14 Ill. 49; Fortier v. Darsy, 31 Ill. 212.

On five of the notes there had been an assignment written by the payee some six months prior to the instrument of September 6, 1871, but no delivery. The circumstances of that transaction are not disclosed. It was incomplete. The title did not vest in the assignee. On the other notes there was never any indorsement, and there can be no question that the legal interest in all these notes remained in the donor down to and at the time of his death. This bill is brought by the volunteer, to have the court complete what the donor left incomplete, by compelling the transfer to him of the legal interest in these notes. There being no consideration, the court, upon its general principles, cannot complete what it finds thus incomplete.

As was said by this court in Clarke v. Lott, 11 Ill. 115: "The principle is well settled, that a court of equity will not lend its aid to establish a trust at the instance of mere volunteers. If the transaction, on which the voluntary trust is attempted to be esablished, is still executory or incomplete, the court will decline all interference in the matter."

There was something said in argument by counsel for defendant in error, about there being a meritorious consideration. That might, perhaps, arise in favor of a wife or child, where there is a moral obligation and duty of support on the part of the donor. But here the defendant is a grandchild, and he asks the aid of the court in completing this transaction as against the other grandchildren of the donor, whose claim is equally meritorious. There was an attempt made by plaintiff below to show by the declarations of the donor, that the other children were provided for, but whatever force there was in that evidence, it was rebutted by the evidence of defendants below.

The decree of the court below will be reversed and the cause remanded.

Decree reversed.

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## LOCKREN v. RUSTAN.

(Supreme Court of North Dakota, 1899, 9 N. Dak. 43, 81 N. W. 60.)

BARTHOLOMEW, C. J. . . . In 1881, Ole Helgeson Rustan, with his family, removed from the State of Minnesota to Walsh county in

this state, and acquired the title to the Walsh county lands here in dispute under the government land laws. While resident in Minnesota he contracted quite a large indebtedness, which remained unpaid when he settled in Walsh county. He received a receiver's final receipt for 160 acres of said land on December 20, 1881, and very soon thereafter he and his wife joined in a conveyance of said land by warranty deed to one M. Raumin. Said deed was made without any consideration whatever, but with the understanding that the said Raumin should convey said land to Helge O. Rustain, the son of Ole Helgeson Rustan, and the same was so conveyed a few days thereafter by warranty deed. Helge O. Rustan was at that time a lad about 13 years of age. On August 10, 1883, Ole Helgeson Rustan received the final receiver's receipt upon the other quarter section of land in Walsh county, and very soon thereafter he joined with his wife in a conveyance of the same to his brother-in-law, one Mylie. This conveyance was also without consideration, but made with the understanding that the said land should be conveyed to said Helge O. Rustan, and it was so conveyed in 1887. The avowed object of Ole Helgeson Rustan in thus placing the title to the land in his own son was, as he expresses it, "to get protection until he could pay his debts." The law would say upon this admission that his object was to hinder, delay, or defraud his creditors, and we will so treat it.

The Rustan family continued to reside upon said land. Ole Helgeson Rustan, the father, treated the land in all respects as if it were his own. He paid all expenses incurred in improving and cultivating the same, and received all the produce therefrom. Helge O. Rustan did not know that the title to the land was in his name until about 1890, as the testimony shows. He had executed mortgages upon some of the land, but had signed the papers at the direction of his father, without understanding what they were. But about 1890 the matter was talked over and explained, and the father told him that the land must be deeded back whenever he (the father) desired it, to which the son fully assented. In 1892 the father purchased the land in Cavalier county, paying the full purchase price himself, but had the title transferred to his son Helge, for the same fraudulent purpose that induced him to have the title to the Walsh county land placed in his son. This the son well understood at the time, and promised to convey it to the father whenever by him so requested. Such was the con-

dition of the title and the relative rights of the parties on August 20, 1896, when the son,—he says at the request of his father,—without any money consideration whatever, conveyed all the land to his father. It should be stated that prior to this time, and prior to the bringing of the breach of promise action, Ole Helgeson Rustan had settled all his old debts, and owed nothing except what was secured. Under this state of facts, was the conveyance from son to father in fraud of the rights of the plaintiff?

It must be conceded that no such conveyance could have been enforced. There was no trust relation between these parties, either by contract or as a resulting trust or *ex maleficio*. Where a trust exists, it can be enforced in equity. The son held the full legal title, and he held the equitable title, as against all the world except the creditors of the father. They, so far as we know, never at any time sought to disturb the title of the son. The land in the hands of the son was subject to his debts. Had a creditor of his obtained judgment against him while the title stood in his name, the judgment would have been a lien upon the land, and no transfer to the father could have affected the lien. To that extent the grantee, in a conveyance made to hinder, delay, or defraud creditors, is the owner of the land. But, as to strangers to the conveyance, the property rights of the fraudulent grantor in the subject of the grant are superior to the property rights of the fraudulent grantee. In other words, in a contest between the creditors of the grantor and the creditors of the grantee, the former will succeed. Bank v. Lyle, 7 Lea, 431; Clark v. Rucker, 7 B. Mon. 583. This shows that the property rights of the vendor have not been extinguished. But the law, for reasons of public policy and to discourage fraudulent conveyances, will not permit him to assert them. If, then, these property rights exist; if the grantor purchased and paid for the property and has never received anything therefor from the grantee; if the only right or equity that the grantee has in the property is his right to claim the protection of a technical rule of law that will not permit him to be attacked, not by reason of any rights in him, but solely on the ground of public policy, —it must follow that, in good conscience and morals, the grantee ought to reconvey to the grantor, if the latter so request. In Wait, Fraud. Conv. § 398, it is said: "Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be

under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith; and, until the creditors of the vendee acquire actual liens upon the property, they have no legal or equitable claims in respect to it higher than or superior to those of the grantor." See, also, Biccohi v. Casey-Swasey Co. (Tex. Sup.) 42 S. W. Rep. 963; Davis v. Graves, 29 Barb. 480; Dunn v. Whalen (Sup.) 21 N. Y. Supp. 869; Moore v. Livingston, 14 How. Prac. 1; Starr v. Wright, 20 Ohio St. 107; White v. Brocaw, 14 Ohio St. 341; Bank v. Brady, 96 Ind. 509; Sabin v. Anderson (Or.) 49 Pac. Rep. 872. There being, then, a moral obligation of the highest type resting upon the son to convey to the father, the discharge of that obligation furnishes ample consideration for such conveyance, and the conveyance, if received in good faith, works no legal fraud upon any party whose rights to the property conveyed are not in law superior to the rights of the father. . . .

In the case at bar it is too plain for suggestion that Ole Helgeson Rustan, in receiving the conveyance from his son, occupied the position of one who received the conveyance in extinguishment of a pre-existing obligation. He had the highest motive of self-interest to serve. If he did not obtain the deed to the land, circumstances might, and probably would, make it forever impossible for the son to fulfill his obligation to his father. True, he knew that, by receiving satisfaction of this obligation, he necessarily postponed the claim of plaintiff. But he was under no obligation, legal or moral, to protect her rights. Indeed, in some respects, his equities are greater than those of an ordinary creditor who receives a conveyance. Generally, the grantor cancels his obligation by transferring his own property in satisfaction thereof. Here the grantor canceled his obligation by transferring to the grantee what was in morals, but not in law, the grantee's own property. We are clear that no fraud can be charged to this grantee, unless the evidence and circumstances establish the fact that he took the conveyance, not to save his property, but to hinder, delay, or defraud the plaintiff. We do not think that is the case. True, the ever-present thought that he regarded plaintiff's claim as unjust, and was bitterly opposed to permitting her to receive anything thereon, makes it difficult to draw the distinction. The grantee testifies that he

told his son that he wanted the land back, and requested him to make the deed; that he knew his son was getting into trouble by reason of plaintiff's claim, and he feared that, if the land was left in the son's name, the plaintiff might get hold of it; that she might get a judgment that would be a lien upon it. He categorically denies that his object in taking the conveyance was to hinder or defraud plaintiff, and this, we think, is substantially true, notwithstanding his aversion to her recovering anything. The desire that he may have had that his son should not pay this claim must, in the nature of things, have been entirely subordinate to his desire that the son should not pay the debt with his (the father's) property. His interest in protecting and preserving his own property must have been immeasureably greater than any interest he could have in defrauding plaintiff. We are bound to believe that he was influenced by the stronger, and not by the weaker, motive, particularly when all the direct evidence so declares. And, indeed, in protecting and preserving his own property, he could not defraud plaintiff, because she could have no claim upon his property. But it is urged that it is certain that he did not take the property back because he wished to preserve it for himself, for the reason that he immediately conveyed it to another son, and the trial court found that this transfer was without consideration. We do not deem this latter point of importance. It is clear to us that in deeding the property to another son he acted *ex abundanti cautela,* and in the mistaken belief that he was thus placing another barrier between his property and the danger that menaced it. We find nothing in the record that requires a reversal. We adopt the judgment and decree of the trial court, which are in all things affirmed. All concur.

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## JEWELL v. BARNES' ADMINISTRATOR.

(Kentucky Court of Appeals, 1901, 110 Ky. 329, 61 S. W. 360.)

Appellant, Robert M. Jewell, filed this suit against the appellees, the Louisville Trust Company, as the administrator with the will annexed, and S. S. Barnes, the residuary devisee, of C. P. Barnes, deceased. The court below sustained a demurrer to his petition, and,

he failing to plead further, dismissed the action. The only question on the appeal is, therefore, did the petition state a cause of action?

It was alleged in the petition that C. P. Barnes was at the time of his death, and had been for many years theretofore, engaged in business as a jeweler, with his brother, J. B. Barnes, under the firm name of C. P. Barnes & Co.; that the business was a large one, and C. P. Barnes became a wealthy man; that in the year 1877, when appellant was a small boy, the deceased took him into his employ and treated him as if he had been his own son, often promising him an interest in the business; that appellant started with a small salary, which was increased from time to time until the death of the deceased, when he was receiving $20 a week; that the deceased died, leaving a will which was duly admitted to probate, and by the seventh clause of the will the testator provided for him in the following language: "I desire that my friend Robert M. Jewell be retained in the employ of the firm on such liberal terms as his long and faithful service entitles him to." It is also alleged that on February 23, 1895, within a month after the death of the testator, against his protest, his salary was cut down from $20 to $15 a week, and three years later, on February 26, 1898, to $13.50 a week; that about two months after this, without fault on his part, he was discharged, against his protest, and had been unable to earn anything like $20 a week from the time of his discharge to the filing of the suit; that appellees were running the store with great profit, and it was incumbent on them, under the will, to keep him in their employment at $20 a week; that his wages for the time amounted to $4,780, and he had only received $3,045.70, leaving a balance due him of $1,734.30; that C. P. Barnes was the owner of a larger interest in the firm than his brother, J. B. Barnes, and by his will gave to his brother enough of his holdings in the firm to make the brother and the testator's widow, appellee, S. S. Barnes, equal partners in the business; that they continued the business under the same firm name from the death of the testator, on February 5, 1895, until May 19, 1897, when the brother, J. B. Barnes, sold out his interest in the firm to the widow, appellee, S. S. Barnes, and that she had continued the business under the name of C. P. Barnes & Co. It will be observed that the brother, J. B. Barnes, is not sued. The suit is brought against the personal representative and the widow as residuary devisee. It will be also observed that, although appellant's salary was cut down

to $15 soon after the testator's death, he continued with the firm and continued to accept the salary that was paid him; and things remained in this shape until after J. B. Barnes sold out, and appellee S. S. Barnes took charge of the business in her own right, after the dissolution of that firm, and appellant continued to work for her and to accept the reduced salary from her until he was discharged by her something like a year afterwards.

It is insisted for appellant with great earnestness that the will creates a precatory trust in his favor, and that he is entitled under the will to his wages at $20 a week. The will does not fix the salary that appellant is to receive if retained in the employ of the firm, nor does it require that he shall be retained. The language imports no more than an expression of the testator's desire, and the clause was, no doubt, put in this shape so as not to embarrass the devisees in the management of their affairs. The will contemplated that the brother and wife of the testator, as a firm, would continue the business; and to this firm the testator expressed the desire that it would retain appellant in its employ on such liberal terms as his long and faithful service entitled him to. The amount of compensation is expressly left to the firm, and no desire is expressed as to anything that should be done after that firm went out of business. The suit here is not against that firm, and, if this action can be maintained, the clause in question will amount, in substance, to a charge of an annuity upon the widow, appellee, S. S. Barnes, in favor of appellant, unless she quits the business. The testator clearly intended no such result. In Shaw v. Lawless, 5 Clark & F. 129, the testator expressed his "particular desire" that the devisee, when he received the property, should continue L. "in the receipt and management thereof, and likewise employ and retain him in the receipt, agency and management of the rents," at the usual fees allowed to agents for this reason, as expressed in the will: "He having acted for me, since I became possessed of said estate, fully to my satisfaction." It was held that no precatory trust resulted. Among other things, the Lord Chancellor said: "All cases upon a subject like this must proceed on a consideration of what was the intention of the testator. Now, the first observation that strikes one with reference to that matter is that during the life of the testaor Lawless was his agent. But then he was agent only during the testator's pleasure, and by the terms of the will the testator desired that he should continue

in the agency. Is that desire to be considered a command? If so, for what length of time is he to continue. . . . If Lawless is the equitable incumbrancer to the amount of one-twentieth part of the income of the estate, he had a clear interest in the residue, for he might take one-twentieth part of the residue; he might file a bill in chancery in order to control the application of the residue and claim to be absolutely invested in what he is entitled to receive, namely, this one-twentieth part." So, here, if the clause in question created a precatory trust, appellant would have been entitled to maintain a bill in equity to protect his rights and prevent the firm from taking any steps that might imperil his annuity. Such a right might render the estate of the devisee materially less valuable, and make appellant to no small extent, the real beneficiary under the will. The case above referred to was followed in Foster v. Elsley, 19 Ch. Div. 518, and Finden v. Stephens, 22 Eng. Ch. 142. See, also, Perry, Trusts, section 123. The firm composed of the widow and the brother were not required to continue the business. They might close it out at pleasure. If they had sold to a stranger, clearly no trust would have attached in favor of appellant to the assets in their hands received from the sale. When the brother sold to the widow, he was acquit of all responsibility. It was not the testator's purpose to create a permanent charge of the corpus of the estate in the hands of the devisees; and the widow after her purchase was under no obligation to keep appellant indefinitely in her service, regardless of the amount of business she did, or other circumstances affecting her interest. Judgment affirmed.

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## HOEFFER v. CLOGAN.

(Supreme Court of Illinois, 1898, 171 Ill. 462, 49 N. E. 527.)

Cartwright, J. . . . The devise and bequest were made to the Holy Family Church in trust for a specific purpose, which was, that the church expend the proceeds of the sale of the real estate and the amount of the bequest in masses for the repose of the souls of the persons named. They were not intended as gifts to the church for its general uses, and any other application than that specified in the will would contravene the purpose of the testator. This being so, it

is claimed that the trust is void because it is a private trust with the souls of particular deceased persons as beneficiaries, none of whom can come into court and call the trustees to account or enforce its execution and also for want of a trustee capable of taking legal title to the property. On the other hand, it is claimed that the devise and legacy are for a charitable use within the meaning and spirit of the doctrine on that subject, and if this position is correct, the rules of law which would invalidate them as an express private trust will not affect their validity.

The doctrine of charitable uses has been repeatedly held to be a part of the law of this State. The equitable jurisdiction over such trusts was not derived from the statute of charitable uses, (43 Eliz., chap 4) but prior to and independently of that statute charities were sustained, irrespective of indefiniteness of the beneficiaries or the lack of trustees or the fact that the trustees appointed were not competent to take. (Heuser v. Harris, 42 Ill. 425; Vidal v. Girard, 2 How. 127.) The statute, however, became a part of the common law of this State. Heuser v. Harris, *supra;* Hunt v. Fowler, 121 Ill. 269; Andrews v. Andrews, 110 Ill. 223.

The statute of charitable uses of Elizabeth has, since its passage, been considered as showing the general spirit and intent of the term "charitable," and the objects which come within such general spirit and intendment are to be so regarded. The definition given by Mr. Justice Gray in the case of Jackson v. Phillips, 14 Allen, 56, was adopted and approved by this court in the case of Crerar v. Williams, 145 Ill. 625. It is as follows: "A charity, in a legal sense, may be more fully defined as a gift, to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burthens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." Any trust coming within this definition for the benefit of an indefinite class of persons sufficiently designated to indicate the intention of the donor, and constituting some portion or class of the public, is a charitable trust. Among such objects are the support and propagation of religion

and the maintenance of religious services, (Andrews v. Andrews, supra,) to pay the expense of preaching and salary of rectors, (Alden v. St. Peter's Parish, 158 Ill. 631,) or the preaching of an annual sermon in memory of the testator. Duror v. Motteux, 1 Ves. Sr. 320.

The doctrine of superstitious uses arising from the statute 1 Edward VI, Chap. 14, under which devisees for procuring masses were held to be void, is of no force in this State and has never obtained in the United States. In this country there is absolute religious equality, and no discrimination, in law, is made between different religious creeds or forms of worship. It cannot be denied that bequests for the general advancement of the Roman Catholic religion, the support of its forms of worship or the benefit of its clergy, are charitable, equally with those for the support or propagation of any other form of religious belief or worship. The nature of the mass, like preaching, prayer, the communion, and other forms of worship, is well understood. It is intended as a repetition of the sacrifice on the cross, Christ offering Himself again through the hands of the priest and asking pardon for sinners as He did on the cross, and it is the chief and central act of worship in the Roman Catholic Church. It is a public and external form of worship,—a ceremonial which constitutes a visible action. It may be said for any special purpose, but from a liturgical point of view every mass is practically the same. The Roman Catholic church believes that Christians who leave this world without having sufficiently expiated their sins are obliged to suffer a temporary penalty in the other, and among the special purposes for which masses may be said is the remission of this penalty. A bequest for such special purpose merely adds a particular remembrance to the mass, and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less public acts of worship because of their memorial character, and in Duror v. Motteux, *supra,* the trust for the preaching of an annual sermon in memory of the testator was held to be a charitable

use. The mere fact that the bequest was given with the intention of obtaining some benefit or from some personal motive does not rob it of its character as charitable. The masses said in the Holy Family Church were public, and the presumption would be that the public would be admitted, the same as at any other act of worship of any other christian sect. The bequest is not only for an act of religious worship, but it is an aid to the support of the clergy. Although the money paid is not regarded as a purchase of the mass, yet it is retained by the clergy, and, of course, aids in the maintenance of the priesthood.

In the case of Schouler, Petitioner, 134 Mass. 426, it was held that a bequest of money for masses was a good charitable bequest of the testatrix, and the court said: "Masses are religious ceremonials or observances of the church of which she was a member, and come within the religious or pious uses which are upheld as public charities." So in Pennsylvania, it has been held that a bequest to be expended in masses for the repose of souls is a religious or charitable bequest under the statute. (Rhymer's Appeal, 93 Pa. St. 142; Selbert's Appeal, 18 W. N. Cas. 276.) A recent case decided in the Irish courts, January 24, 1897, is Attorney General v. Hall. It was held unanimously, both in the Exchequer and the Court of Appeals, that a bequest for saying masses for the soul of a deceased person was a good charitable bequest.

In New York and Wisconsin it has been held that a trust of this character is void for the want of a definite beneficiary to enforce its execution. (Holland v. Alcock, 108 N. Y., 312; McHugh v. McCole, (Wis.) decided October 27, 1897. But the decisions in those States are readily distinguishable from the rule in this State. In New York charitable uses were abolished by legislation, and in all valid trusts there must be a definite and certain beneficiary to take the equitable title, unless the act of 1893, which is said to have resulted from the decision in Tilden v. Green, 130 N. Y. 29, has enlarged or relaxed the rule as to a definite beneficiary. In Wisconsin all trusts are abolished by statute, except certain specific trusts where there is certainty in the beneficiaries, and in that State bequests have been held to be void which have been uniformly sustained in this court as for charitable purposes. The decision in McHugh v. McCole, *supra,* was upon the ground that the doctrine of charitable uses was not in force in that State, and

that a trust to be sustained, must be of a clear and definite nature, and the beneficiary interest to every person therein must be fully expressed and clearly defined upon the face of the instrument. The will in that case gave a certain sum of money to the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, to be used and applied in specified amounts for masses for the repose of testator's soul and the souls of certain named persons. It was held invalid solely on the ground that the provision amounted to a trust which, under the statutes of that State, was invalid. It was said that if the testator had made a direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of persons named in his will it would be valid, and the court said: "We know of no legal reason why any person of the Catholic faith believing in the efficacy of masses may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls of others, as he may choose." The court expressed regret that the intention of the testator could not be given effect because he had put it in the form of a trust provision. So, also, in New York it has been held in several cases that a bequest to a named priest for the saying of masses for the repose of the souls of specified persons is valid. Ruppel v. Schlegel, 7 N. Y. Sup. 936; In re Howard's Estate, 25 id. 1111; Vanderveer v. McKane, 25 Abbott's N. C. 105.

The case of Festorazzi v. St. Joseph's Catholic Church, 104 Ala. 327, holds that a bequest to that church in the city of Mobile, to be used in solemn mass for the repose of the testator's soul, could not be supported as a charitable bequest. The decision seems to be on the ground that the testator's own soul was the exclusive object and beneficiary of the trust, and that no public benefit was to be derived from it and no living person was able to call the trustee to account. We are not able to agree with the conclusion that there is no benefit to the church or public in such case, and, as we have seen, the ceremonial of the mass is a public action which can be seen and taken cognizance of, so that there is no more difficulty in procuring a mass to be said than there is in securing the public delivery of a sermon or a lecture. A bequest for the erection of a public statute or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it.

We think the devise and legacy charitable, and a rule applicable to trusts is that they will not be allowed to fail for want of a competent trustee. The court will appoint a trustee or trustees to take the gifts and apply them to the purposes of the trust. Heuser v. Harris, *supra*.

The decree of the circuit court is reversed and the cause is remanded, with directions to proceed in conformity with the views herein expressed.

Reversed and remanded.

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## BARKLEY v. DONNELLY.

(Supreme Court of Missouri, 1892, 112 Mo. 561, 19 S. W. 305.)

THOMAS, J. This is a suit in equity by the heirs of Mary A. Troost to recover the beneficial interest in certain property in Kansas City, attempted to be donated by the will of Mrs. Troost to certain religious and charitable objects, and asking a construction of the will for this purpose. . . .

The petition sets out the will *in haec verba*, which after devising considerable property to the plaintiffs, and making a few other special bequests, contains the following: . . .

"Item 18. I give and devise to the City of Kansas the parcel of land . . . containing from five to ten acres . . . called the 'Fry Place,' to hold the same in trust, however, for the following uses and none other: for a home and place for the maintenance and education of poor children, and the same shall be called the 'Gillis Orphan Asylum.' . . ."

Another contention of plaintiffs is that the trusts upon which the Fry Place, and the lots upon which the Gillis opera house has been built were devised, cannot be carried out for two reasons: First, because the beneficiaries thereof are so indefinite and uncertain that they cannot be ascertained, there being no power in the City of Kansas or the trustees named "to determine who are 'poor children,' or to, select from the innumerable multitude upon the earth those that shall partake of the testatrix's 'bounty' ".

This proposition cannot be maintained. The bequest is for a charity and for charitable uses. The beneficiaries then are "poor children" who are objects of charity, and such "poor children" are and have always been a well-recognized and a well-defined class.

But it is urged that the bounty must wholly fail, because the charity of this lady extended to an "innumerable multitude," and was as broad as the earth. We cannot yield assent to this doctrine. When the asylum is built, and is filled to its capacity with poor children, it would be inhuman to turn those out who are under its protecting care, because it could not receive all who might apply, and who might be found to be worthy. The charitable institutions of earth will not be closed, ought not to be closed, simply because they have not the means or capacity to relieve all the suffering that flesh is heir to. The poor we have always with us, and our first and most sacred duty is to care for those who are unable to care for themselves, and courts of equity have always been liberal in the construction of wills devising property for charitable uses.

Among others, the following devises have been upheld: "To furnish relief to all poor emigrants and travelers coming to St. Louis on their way *bona fide* to settle in the west" (Chambers v. City of St. Louis, 29 Mo. 543); "for the worship and service of God" (Attorney General v. Pearson, 3 Meriv. 352); "for objects and purposes of charity, public and private" (Saltonstall v. Sanders, 11 Allen, 446); "for the benefit of the Christian religion, to be applied in such manner as, in the judgment of the executor would best promote the object named" (Miller v. Teachout, 24 O. St. 525); "Such charitable institutions of the city of St. Louis, Missouri, as the executor might deem worthy" (Howe v. Wilson, 91 Mo. 45); for "such charitable purposes" as the trustee might deem best (Powell v. Hatch, 100 Mo. 592); for the suffering poor of the town of Auburn" (Howard v. American Peace Society, 49 Me. 288); and for "a church school for boys" (Halsey v. Convention, 23 Atl. Rep. (Md.) 781.) . . .

## QUIMBY v. QUIMBY.

(Illinois Appeal Court, 1912, 175 Ill. App. 367.)

McSurely, J. Jane E. Reynolds by her will dated September 4, 1889, devised and bequethed her entire estate to Benjamin F. Quimby,

upon certain trusts therein mentioned, "giving to him as such trustee such power and authority over the property . . . as may be necessary to carry my intentions into effect in the execution of my will."

The controversy before us arises over the bequest of the remainder of her estate, which is as follows:

"I further direct my said executor to give and convey all the remainder of my estate, goods and chattels to my beloved grandson Walter Reynolds Quimby, whenever he may appear and make claim to or for the same. If, however, at the expiration of five years from the date of my said decease, my said grandson does not so appear and at the end of such period of five years it is not known that my said grandson is living, I hereby direct that all that may remain of the money and amounts due me which may be collected by my said executor or trustee, with the accumulated interest, shall be paid to the Chicago Waif's Mission and Training School."

The grandson, Walter Quimby, never appeared. He had disappeared in 1880, some nine years prior to the making of the will, and was never found. It is alleged in the answer filed by the heirs claiming the fund that he is dead that he died before the death of Jane E. Reynolds, and the decree entered by the chancellor so finds.

The Chicago Waif's Mission and Training School was a voluntary association conducting a Sunday School for neglected children in the city of Chicago, and afterwards in addition to religious services began looking after the temporal welfare of dependent boys. It was organized as a corporation not for profit on January 22, 1889, the objects, as stated in its articles of incorporation, being "to provide suitable homes for the homeless and the dependent and needy boys and girls in the State of Illinois, wherein they may be properly cared for while they are being educated and taught some useful trade or occupation, and aid them in various other ways."

Mrs. Reynolds, the testatrix, having died on November 17, 1894, the five years within which her grandson Walter Quimby, could claim the bequest to him expired on November 17, 1899. At that time the Chicago Waif's Mission and Training School had wholly ceased to carry on the work for which it was organized, or any other work, having about a year prior to that time turned over to the Illinois Industrial Training School for Boys, at Glenwood, Illinois, all of its property and boys. The Illinois Industrial Training School for Boys after-

wards changed its name to the Illinois Manual Training School Farm, and is the appellant here. On July 1, 1902, an order of cancellation of the charter of the Chicago Waif's Mission and Training School was entered in the office of the Secretary of State, and it has never been reinstated.

Benjamin F. Quimby, the trustee named in the will, having died July 17, 1897, the Title Guaranty & Trust Company was appointed trustee to succeed him on May 4, 1898. The Chicago Title & Trust Company (which by consolidation has succeeded the Title Guaranty & Trust Company as trustee) on November 4, 1908, filed its petition in the chancery court representing that distribution could not be made to the Chicago Waif's Mission and Training School as it had ceased to carry on the charitable work for which it was organized, and set up the claim of the heirs and of others and asked for an order of court in the premises. The bill made as parties defendant the heirs of Walter Reynolds Quimby and "unknown owners." To this bill certain collateral heirs at law of the testatrix filed their answer, as did the Attorney General, who was made a defendant. The Illinois Manual Training School Farm filed its answer as one of the unknown owners made parties defendant to the petition, and claimed the fund under the equitable doctrine of *cy pres,* by reason of the similarity of the work carried on by it to that carried on by the Chicago Waif's Mission and Training School. This training school farm is a corporation not for pecuniary benefit. Its object is stated in its articles of incorporation thus: "To provide a home and proper training school for destitute and dependent boys who may be committed to its charge." Upon hearing, a decree was entered by the chancellor finding the facts as above set forth, and also determining the heirs at law and next of kin of Jane Reynolds, and further that inasmuch as the Chicago Waif's Mission and Training School ceased to carry on the charitable work for which it was organized on July 14, 1898, "and has not since said last mentioned date done or performed any of the work for which it was organized, and has discontinued the exercise of its corporate functions and abandoned its corporate franchises, it is not now entitled to said trust estate or any part thereof." The decree further found "that there is nothing in said will of Jane E. Reynolds, deceased showing a general charitable intention, and showing that the said testatrix intended to devote said trust estate to charitable purposes in the event

that the gift over to the Chicago Waif's Mission and Training School failed, and that therefore the said trust estate ought not to be applied *cy pres* by the court to other charitable purposes." From this decree the Illinois Manual Training School Farm, hereinafter called appellant, has appealed to this court.

Counsel for appellant correctly say that: "The sole question presented is: Does the record make out a case for the application of the *cy pres* doctrine? "The usual definition of the equitable rule of *cy pres* has been stated thus: "When a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, the duty may be performed with as close approximation to that scheme as reasonably practicable." 12 Cyc. 1191. And in White v. Fisk, 22 Conn. 30, the *cy pres* doctrine is thus described: "It seems to be this, that if it can be seen that a charity was intended, by a testator, but the object specified cannot be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a sort of waif, and apply them as his, or the king's good conscience, shall direct. . . . In this way the chancellor substitutes himself in the donor's place, and really makes the will himself." If this broad statement of the rule comprehended all the elements involved, the application of it would be comparatively free from difficulty. Courts would determine only whether the organization named by will as the beneficiary was capable of taking, and if it were incapable what other organization nearest approached it in its purposes and work. In undertaking to carry out the intentions of persons making charitable bequests, courts early were met with the question of whether or not the testator had intended to aid a general class needing charitable assistance, or only the particular and specific organization named in the will. Almost without exception, therefore, the cases in which the application of the rule of *cy pres* is sought turn upon the conclusion of this court as to whether or not the will evidenced a general charitable intent. This is the controlling inquiry before us. From an inspection of the clause of the will under consideration it is seen that the testatrix used no special words indicating an intention to benefit needy boys and girls generally; so that the critical question arises, can a general charitable intent to benefit a particular class of dependents be deduced from the sole fact that the organization named

in the will was engaged in charitable work for that particular class of dependents? Or applying the question to the facts before us, can a general charitable intent to benefit needy boys and girls generally, be deduced from the sole fact that the Chicago Waif's Mission and Training School was engaged in charitable work for needy boys and girls? Many cases have been cited by counsel for both parties but none exactly in point as touching this particular question.

The general rule stated in Pomeroy's Equity Jurisprudence, vol. 3, page 1964, is: "A limitation upon the generality of the doctrine seems to be settled by the recent decisions, that where the donor has not expressed his charitable intention generally, but only by providing for one specific particular object, and this object cannot be carried out, or the charity provided for ceases to exist before the gift takes effect, then the court will not execute the trust; it wholly fails." And in Underhill on Wills, vol. 2, page 1230, the statement is made: "If, however, the testator has not used language from which a general charitable intent may be implied, or if he has pointed out some particular institution or mode of application by which the charity is to be carried out, the court will not decree an execution *cy pres,* when, for any reason, the carrying into effect of the particular charitable intent of the testator becomes impracticable." It would serve no useful purpose to cite the many cases in which is discussed this limitation upon the general rule of *cy pres,* but from a study of these cases it will be seen that the test seems to be this, that if the bequest is to a cause or for a purpose or to aid and further a plan or scheme of public benefit, there is evidence of a general charitable intent. This is illustrated in Richardson v. Mullery, 200 Mass. 247, a case which appellant's counsel urge as sustaining their contention. In this case the gift was "to the life-saving station to be built and established," and it was held not to be a gift to any specific organization, but to whichever life-saving station might be engaged in the usual work of such a station in that locality. A similar case in Mason v. Bloomington Library Ass'n, 237 Ill. 442, where the bequest was to "an art studio or art gallery and studio, meaning thereby a suitable place wherein works of art will be collected, kept, preserved or exhibited for the advancement of education in art." Applying this test to the clause of the will before us, it will be seen at once that the gift is not to any cause, plan or scheme of charity, but to a specific and particular organization. We therefore

must hold that the better resasoning favors the conclusion that no general charitable intent was indicated by the testatrix in her will. To hold otherwise would so extend the application of the rule of *cy pres* as to compel courts to administer charitable bequests in every case where the particular object named in the will is capable of taking, unless apt words negativing such a course should be used in the will. The true rule is that the court will not act for the testator in this regard unless some words are used in the will showing an intention which only the chancery court can carry out.

Counsel for appellant urge that the gift to the Chicago Waif's Mission and Training School being for a charitable purpose, therefore the gift was a charitable gift or a gift to charity. This may be true in a certain sense, but it does not follow from this fact alone that it was a gift to charity generally.

We have reached the foregoing conclusion not forgetting that gifts to charity are especially favored in law, and that courts should be "keen-sighted" to discover an intention to make a gift to charity.

For the reasons above indicated the decree of the chancellor will be affirmed.

Affirmed.

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## MASON v. BLOOMINGTON LIBRARY ASSOCIATION.

(Supreme Court of Illinois, 1909, 237 Ill. 442, 86 N. E. 1044.)

HAND, J. It is first contended that the first paragraph of the will creates a perpetuity and is void, and that the court erred in appointing a trustee and in directing that the amount remaining of the $500 mentioned in that paragraph, after the purchase of a monument, should be turned over to a trustee to be kept at interest, the interest to be expended in the care of the family burial lot where the testatrix should be buried.

The law is well settled in this country that a perpetual trust cannot be created to take care of a private burial lot unless the creation of such trust is authorized by statute. (6 Cyc. 918; 5 Am. & Eng. Ency. of Law,—2nd ed.—933; Bates v. Bates, 134 Mass. 110; Coit v. Comstock, 51 Conn. 352; 50 Am. Rep. 29; Johnson v. Holifield, 79 Ala.

423; 58 Am. Rep. 596; Hopkins v. Grimshaw, 165 U. S. 342.) In this State the legislature has provided (Hurd's Stat. 1905, p. 223,) that trusts may be created for such purposes in the hands of the board of directors provided for by "An act to provide for the proper care and management of county cemetery grounds," but there is no statute in this State which provides for the creation of such a fund in the hands of a private trustee. A trust created under a statute authorizing a trust to be created in perpetuity for the purpose of caring for and keeping in repair a cemetery, burial lot or monument is characterized by the court in Morse v. Inhabitants of Natick, 176 Mass. 510, (57 N. E. Rep. 996) as a statutory trust in contradiction to a charitable trust. The cases of Green v. Hogan, 153 Mass. 462, and Jones v. Habersham, 107 U. S. 174, are not, therefore, in point. In Bates v. Bates, *supra*, the court said an examination of the authorities (and many cases are cited) "will show that it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial place could not be treated as a public charity and thus made perpetual, and that such bequest would be void." It was also pointed out in that case that there was in force in that State a statute similar to the statute in this state hereinbefore referred to, but it was said "these statutory provisions have here no application." And in Coit v. Comstock, *supra*, it was said: "It has been held in numerous decisions that bequests for the purpose of keeping burial lots or cemeteries in good order or repair are not given in charity, and therefore are not protected by the Statute of Charitable Uses." And in Johnson v. Holifield, *supra*, it was said: "It seems to be well settled by the course of decisions that a bequest of money, the interest thereon to be perpetually applied to preserving and keeping in repair the graves and monuments of testatrix and other named persons, is repugnant to the rule against perpetuities, and void."

We would be glad to hold, were it possible so to do, the trust attempted to be created by the testatrix by the first paragraph of her will valid. We are, however, forced by the current and great weight of authority to hold that a trust like the one in question is not a gift to any public use and that its purpose is purely private and secular. Our conclusion is, therefore, that the trust attempted to be created by the first paragraph of the will is void, and that the portion of the $500 mentioned in that paragraph, remaining after the purchase of the

monument, should be treated as a part of the residuary estate of the testatrix and disposed of under paragraph 9 of said will.

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## CHAMBERLAIN v. STEARNS.

(Supreme Court of Massachusetts, 1873, 111 Mass. 267.)

GRAY, J. The question presented by this case is, whether a devise in trust, to be applied "solely for benevolent purposes" in the discretion of the trustees, creates a public charity. And we are all of opinion that it does not.

The word "benevolent," of itself, without anything in the context to qualify or restrict its ordinary meaning, clearly includes not only purposes which are deemed charitable by a court of equity; but also any acts dictated by kindness, good will or a disposition to do good, the objects of which have no relation to the promotion of education, learning or religion, the relief of the needy, the sick or the afflicted, the support of public works, or the relief of public burdens, and cannot be deemed charitable in the technical and legal sense.

The only difference of opinion in the adjudged cases on this subject has been upon the question how far the word "benevolent," when used to describe the purposes of a trust, could be deemed to be limited in its meaning by being associated with other words more clearly pointing to a strictly charitable disposition of the fund. In one case in the English chancery, and another in New Jersey, it has been held that even a bequest to trustees to be applied in their discretion for "benevolent, charitable and religious purposes," was too uncertain to be supported. Williams v. Kershaw, 5 Law J. (N. S.) Ch. 84; S. C. 5 Cl. & F. 111; Norris v. Thomson, 4 C. E. Green, 307, and 5 C. E. Green, 489. On the other hand, it has been held by this court and by the House of Lords, that "benevolent," when coupled with "charitable" or any equivalent word, or used in such connection, or applied to such public institutions or corporations, as to manifest an intent to make it synonymous with "charitable," might have effect according to that intent. Saltonstall v. Sanders, 11 Allen, 446; Rotch v. Emerson, 105 Mass. 431, 434; Hill v. Burns, 2 Wils. & Shaw, 80; Crichton v. Grierson, 3 Bligh N. R. 424; S. C. 3 Wils. & Shaw, 329,

341; Ewen v. Bannerman, 2 Dow & Cl. 74, 101; S. C. 4 Wils. & Shaw, 346, 359; Miller v. Rowan, 5 Cl. & F. 99; S. C. Shaw & Macl. 866.

In the case before us, the devise contains no qualifying or explanatory words, and falls precisely within the case of James v. Allen, 3 Meriv. 17, and the reasons there given. A bequest to executors, "in trust to be by them applied and disposed of for and to such benevolent purposes as they in their integrity and discretion, may unanimously agree on," was there held to be void for uncertainty, and distributable among the next of kin; and Sir William Grant said: "Although many charitable institutions are very properly called 'benevolent,' it is impossible to say that every object of a man's benevolence is also an object of his charity." "What authority would this court have to say that the property must not be applied to purposes however so benevolent, unless they also come within the technical denomination of charitable purposes? If it might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the court to execute." That decision has never been doubted, and is strongly supported by the arguments of Sir Samuel Romilly and the judgments of Sir William Grant and Lord Eldon in Morice v. Bishop of Durham, 9 Ves. 399, and 10 Ves. 521, and by the opinion of Lord Brougham in Attorney General v. Haberdashers' Co. 1 Myl & K. 420, 428, and Lord Langdale in Nash v. Morley, 5 Beav. 177, 183.

As the duration of the trust now in question is unlimited, and the trust property might, in full accordance with the terms of the devise, be wholly applied by the trustees in their discretion to uses and purposes which are not regarded by the law as charitable, the trust is wholly void, and the property must go to the heir at law and residuary devisee.

Decreed accordingly.

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## LORENZ v. WELLER.

(Supreme Court of Illinois, 1915, 267 Ill. 230, 108 N. E. 306.)

Cooke, J. . . . In support of her contention that the court erred in refusing to remove the trustees, appellant urges that they are improper persons to serve in this capacity, for the reason that

Herman Weller and Mary Kiick, the wife of Jacob E. Kiick, are contingent remainder-men, and she relies upon Yates v. Yates, 255 Ill. 66, and similar cases, which hold that contingent remainder-men should not ordinarily be appointed as trustees of the lands in which such remainder exists, and that where such appointment is made and it is opposed by the *cestuis que trustent* who are life tenants, they should be removed by a court of equity upon proper proceedings being instituted. In the Yates case the trustee, who was a contingent remainder-man, was not appointed by the will but was appointed by the original trustee under a provision of the will authorizing him to appoint as his successor some suitable person to execute the trust. The holding in the Yates case is correct but it has no application to the situation here. There the court was dealing with the question whether one who had been appointed as a successor in trust under a power to appoint a suitable person as such successor should be removed by reason of his relationship to the property, while here appellant is asking the court to remove the trustees appointed by the will. It does not necessarily follow that because a court of equity would not, under given circumstances and conditions, appoint certain persons to execute a trust created by a will, that the testator himself could not make a valid appointment of such persons under the same conditions. The desires of a testator in the appointment of a trustee will be observed although he may see fit to appoint a person whose relationship to the estate is such that a court of equity would not appoint him if the appointment was to be made by the court.

Appellant further contends that the trustees should be removed because of the feeling of animosity they admitted and displayed toward her. On the hearing Herman Weller testified that the relations between himself and Henry Lorenz and appellant had not been friendly; that the trustees did not consult appellant or her father as to any of their acts in the execution of the trust; that he did not know how long he had been on unfriendly terms with appellant's family; that it was impossible to be friendly with them, and that he had never known appellant when he could be friendly with her. This is the only testimony on this subject. It does not appear that appellant has ever made an effort to consult with the trustees in regard to the execution of the trust or upon any matters relating thereto, or that they have refused or declined to consult with her or carry out her wishes

so far as the same would be compatible with their duties. While it is true that in many cases it has been said that where the ill feeling between trustees or between the trustees and the *cestui que trust* has become so bitter as to prevent beneficial co-operation in the administration of the trust, the trustee or trustees offending will be removed, that situation does not exist here. While Herman Weller admits he is not on friendly terms with appellant or her father, it does not appear that the relations are such as to interfere with the beneficial administration of the trust. No complaint is made that the management of the estate by the trustees has not been frugal, honest or beneficial.

Appellant complains that one-third of the receipts during the time covered by the two reports filed by the trustees has been paid out for expenses, exclusive of commissions and attorney's fees, argues that this is too large a proportion to put back on the lands in the way of betterments, and insists that it indicates an improper administration of the trust. She does not point out any particular item as having been improperly expended, and no attempt was made upon the hearing to show that unnecessary expenses had been incurred in the way of improving the property.

From a careful consideration of the record we find no basis for the contention that the court erred in refusing to remove the trustees.

The decree of the circuit court in so far as it approved the item paid out for inheritance tax is reversed. In all other respects it is affirmed, and the cause is remanded to the circuit court, with directions to sustain the objection to the item paid for inheritance tax.

Reversed in part and remanded, with directions.

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## BEAVER v. BEAVER.

(New York Court of Appeals, 1889, 117 N. Y. 421, 22 N. E. 940.)

This action was brought by the plaintiff, as executor of Aziel G. Beaver, against The Ulster County Saving Institution, to recover certain deposits amounting to the sum of $2,800 or thereabouts, standing to his credit on the books of the bank.

The administrators of John O. Beaver claiming the money as part of his estate, they were substituted as defendants in place of the bank, the money having been brought into court. The question litigated

was, whether the money represented by the deposits and the accumulations had been vested in Aziel G. Beaver, as a gift from John O. Beaver. The account with the bank consisted of two deposits, one July 5, 1866, of $854.04, and one of October 5, 1866, of $145.96, making in the aggregate $1,000, and the accumulations thereon. It is undisputed that the deposit of $854.04 was made in person by John O. Beaver, and that the money deposited belonged to him. The only evidence to sustain the claim that it was given by him to Aziel G. Beaver is found in the relations between them, and the circumstances attending the deposit. Aziel G. Beaver was the son of John O. Beaver, and in 1866 was seventeen years of age and resided with his father, as one of a family of thirteen children. John O. Beaver made the deposit of July 5, 1866, in the name of Aziel. The rules of the bank required that on making the first deposit the depositor should subscribe a declaration of his assent to the by-laws of the institution and his promise to abide by them. John O. Beaver, at the date of the first deposit, signed, in his own name, a declaration presented to him by the treasurer of the bank, commencing with the words, "I, Aziel G. Beaver, of Esopus, Ulster county, hereby request the officers of the Ulster County Savings Institution to receive from me $854, and to open an account with me," etc. At the same time the savings bank entered on its books an account beginning: "Dr. Ulster County Savings Bank, in account with Aziel Beaver," and crediting said Aziel with the deposit of $854. Under the name of Aziel Beaver were originally written the words, "payable to John O. Beaver." The bank also, at the same time, issued and delivered to John O. Beaver a pass book with a similar entry, as in the account on the books of the bank, containing also, as originally written the words "payable to John O. Beaver".

There are no facts, except as above stated, tending to show a gift of the money deposited to Aziel. On the other hand, many circumstances were shown which are claimed to be inconsistent with a gift by the father to the son of the money deposited. The son married a few years after the deposit was made, and died in 1886, twenty years after the date of the deposits, being then of the age of thirty-seven years, leaving a wife, but no children, surviving. John O. Beaver, the father, died in 1888. The father retained possession of the pass-book at all times until his death. . . .

ANDREWS, J. It is found that the money with which John O. Beaver made the deposit of $854.04, July 5, 1866, belonged to him. The inference that the deposit, $145.96, made October 5, 1866 was also made by him from his own means, does not admit of reasonable question. The pass-book was at all times in his possession. Concurrently with the last deposit, the amount was entered therein. It is affirmatively shown that Aziel, who was then a minor, lived with his father and had no money of his own, and the circumstances are quite satisfactory to show that he never, at any time during his life knew of the bank account. The question in the case turns upon the legal effect of the deposit, made in connection with the attendant and subsequent circumstances. . . .

There was no declaration of trust in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles, if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention. . . .

It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; reasons connected with taxation; rules of the bank limiting the amount which any one individual may keep on deposit; the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire, on the part of many

persons, to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case. It may be true that as between parent and child a presumption of a gift may be raised from circumstances, where it would not be implied between strangers. (Ridgway v. English, 22 N. J. L. 409.) But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this is the natural explanation of the transaction. . . .

We think, for the reasons stated, that the plaintiff failed to establish a gift, or to justify a finding of a gift. The question of gifts, in connection with deposits of savings banks, has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed. . .

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## DEAN v. NORTHERN TRUST CO.

(Supreme Court of Illinois, 1913, 259 Ill. 148, 102 N. E. 244.)

Farmer, J. . . . It was immaterial to a construction of the will, which was the object of the suit, whether the law under which the Northern Trust Company was organized, and the law authorizing the appointment of it as trustee, were valid or not. If it was unauthorized to act as trustee that would not invalidate the will. The trust created by the will for the benefit of Morris Rowland Dean was a valid trust even if the trustee was not eligible to be appointed to or to act in that capacity. (1 Perry on Trusts, sec. 38.) If the appointment of the Northern Trust Company as trustee was unauthorized because it could not act in that capacity, it would not alter or affect in any way

the rights of appellant under the will. That would only require the appointment of a new trustee. "If a trust is cast upon a person incapable of taking and executing it courts of equity will execute the trust by the decree, or they will appoint some person capable of performing the requirements of the trust." (1 Perry on Trusts, sec. 39.) Courts of equity will not allow a trust to fail for want of a trustee. (1 Perry on Trusts, sec. 240; Wilson v. Clayburgh, 215 Ill. 506; French v. Northern Trust Co. 197 id. 30.) The author of the trust has the power to provide for the appointment of a successor in trust if the original trustee cannot act or fails to act for any reason, but where the author of the trust makes no such provision a court of chancery has power to make the appointment. . . .

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## REYBURN v. BAKEWELL.

(Missouri Court of Appeals, 1901, 88 Mo. App. 640.)

Bland, P. J. The agreed state of facts decide the case without anything more. Miss Reyburn, in effect, put in defendant's hands $905.68 in money and said to him "this is yours, keep it for yourself, if you will, if you will not accept it as a gift from me, keep it in trust until the death of my brother, paying him the interest, after his death, give it to the Little Sisters of the Poor of the city of St. Louis." Miss Reyburn parted with all dominion and control over the money, it became defendant's absolutely as it was already in his hands, to keep as a gift or to hold in trust as he might elect. He has generously elected to treat it as a trust and has assumed the obligations of a trustee in respect to it. By his election he is now bound to carry out the provisions of the trust and should be permitted to do so without hindrance, for the trust is a sacred one and should not be disturbed.

The judgment is for the right party and is affirmed. All concur.

## SECTION III. NATURE OF CESTUI'S INTEREST.

### EWING v. PARRISH.

(Missouri Court of Appeals, 1910, 148 Mo. App. 492, 128 S. W. 538.)

GOODE, J. . . . Plaintiff is seeking to collect in the ordinary way a money demand from the Mudd estate as a debtor of the Pitkin estate. But if anything is due the latter estate from the Mudd estate, the liability, in our opinion, did not arise in such a way as to make it recoverable in this kind of proceeding. It could only have arisen from Mudd being trustee for plaintiff as administrator, first of the land he bought in at the foreclosure sale under the Burkett deed of trust, and secondly of the notes he took from Hunt when the land was sold to the latter. In other words, to lay the Mudd estate liable for the proceeds of those notes, a trust must be established wherein Mudd was the trustee for plaintiff as administrator. Moreover, this trust would necessarily be an express and not a resulting or constructive trust. . . .

An action for money had and received will sometimes lie in favor of a *cestui que trust* against the trustee. (Johnson v. Smith's Admr., 27 Mo. 591; Clifford Banking Co. v. Comm. Co., 195 Mo. 262, 94 S. W. 527; Ziedermann v. Molasky, 118 Mo. App. 106, 94 S. W. 754.) Nevertheless, where the trust is disputed and the amount the trustee owes unsettled, thereby putting in issue other questions than the right of the *cestui que trust* to an ascertained balance from the trustee—where, in short, the trust itself must be established—the remedy ought to be in equity. See for full examination of the subject, Johnson v. Johnson, 120 Mass. 465. Even in instances when, the trust being admitted, an action for money had and received is tolerated, this is done because the action is regarded as equitable in its nature. It is clear to our minds that a mere formal demand presented in the probate court is not the kind of proceeding in which the present controversy, considering the scope of it, can be properly investigated. (Nester v. Ross, Est., 98 Mich. 200). The cited case was a demand

preferred in a court of probate for damages for breach of a contract wherein the decedent had agreed to sell timber lands, or to manufacture the timber on the lands, and from the proceeds pay certain debts of the plaintiff Nester; and after said debts were paid and expenses, the remainder of the lands and timber were to be divided in common by the parties. It was held the contract was not only security for the debts to be paid out of the proceeds of the lands and timber, but that it also created a trust in favor of the claimant Nester and the only forum competent to settle the rights of the parties was a court of equity. While the facts of that case are not identical with those at bar, they are sufficiently analogous for the opinion to shed light on the question of law we are to decide and point to the correct decision. Quite in point is Norton v. Ray, Excx., 129 Mass. 230, where it appeared the defendant's testator, Isaac C. Ray, bought at a sale a dwelling house for the plaintiff at the latter's request and with his money and had taken a deed in the name of himself, Isaac C. Ray, but had afterward signed a paper acknowledging the purchase was for Norton's benefit, and that the premises were held for and would be conveyed to the latter upon request. Ray conveyed to Norton's wife, who lived apart from Norton, and the action was against Ray's estate for the value of the premises. There, though the trust was not disputed, it was held the only remedy was in equity; that an action for money had and received would not lie; citing Johnson v. Johnson, 120 Mass. 465. In point, too, is Davis' Admr. v. Coburn, 128 Mass. 377, where the plaintiff's decedent had sent nine hundred dollars to the defendant to keep and invest for the decedent, and that the defendant received the money and kept it in his own name, but mingled it with his own money. It appeared no account had been rendered of the trust and no settlement of the amount due under it had been made. The court said that under those circumstances the remedy was by bill in equity, as an action at law will not lie in favor of a *cestui que trust* against the trustee while the trust remained open.

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## GUN v. BARROW.

(Supreme Court of Alabama, 1850, 17 Ala. 743.)

Dargan, C. J. This was an action, brought by the plaintiff against the defendant in error, to recover four slaves. Upon the trial a bill

of exceptions was sealed by the presiding judge, which shows that the plaintiff, to prove title in himself, introduced a deed of trust, bearing date 24th day of January 1848, which was executed by Larkin R. Gunn, and which purported to convey the slaves in controversy to the plaintiff, upon the trusts that he would apply the proceeds arising from the work and employment of said slaves, to the support and maintenance of Nancy E. Barrow, during her natural life, and in the event that she should have a child or children, the said slaves and their increase, at her death, should descend to such child or children, in equal proportions. . . . The deed then declared that it was the intention of the donor that Nancy E. Barrow should have a life estate in the slaves for her own separate use, free from the charge or alienation of her husband, James H. Barrow, with remainder to the child or children of the said Nancy, and if she should die, leaving no child or children, then the remainder over as before designated. It was shown that Nancy E. Barrow, was the daughter of the grantor, and that, at the time of the intermarriage between her and the defendant, the slaves belonged to the donor. It also appeared that Nancy E. was still living and had children. It was also shown that the slaves went into the possession of the defendant before the execution of the deed, but it was proved by the testimony of the donor and his wife, that the defendant received the slaves with the understanding that the donor should execute a deed of them of similar import to the one read in evidence. . . .

If the property passed by the deed, it is then clear that the legal title vested in the plaintiff as trustee, and still remains in him, for the purpose of executing the trust, and at law, he must recover against any one, who withholds the possession from him. Even if we were to presume, that the husband's possession was that of the wife, or that he held the slaves for her, he could not resist a recovery; for so long as the legal title remains in the trustee, the trusts not being executed, he may recover at law against his own *cestui que trust,* unless the instrument, by which the trusts were created, contain a stipulation that the possession shall remain with the *cestui que trust.* We have said this much upon the supposition that the court was influenced in refusing some of the charges requested, by the idea that the possession of the husband must be considered as the possession of the wife, and that the trustee could not recover against her; but, so far as we can

discover from the record, the defendant set up title in himself, irrespective of the right of his wife. In either aspect of the case, if the deed conveyed the title to the plaintiff, he was entitled to recover, for the trust not being executed, the legal title must still remain in him. . . .

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## COX v. WALKER.

(Supreme Court of Maine, 1847, 26 Me. 504.)

Trespass quare clausum, originally commenced before a justice of the peace. As the writ was, when the action was commenced, there was no allusion in the declaration or writ, to the plaintiff's bringing the suit in any other character, or capacity, than his own. While the action was pending in the District Court, the plaintiff, by leave of Court, amended his writ by adding after the plaintiff's name in the declaration, these words, "as minister of the first Baptist society in Kennebunk." The defendants were Tobias Walker, Israel Taylor and Jamin Smith. . . .

Tenney, J. This is an action of trespass, quare clausum fregit, brought by the plaintiff as the minister of the First Baptist Society in Kennebunk and for their use. . . . In a second plea, as to the acts admitted to have been done, the defendants say, that the close was conveyed by the deed of George Taylor, dated October 20, 1835, to two of the defendants and others, therein named, to be held in trust for the First Baptist Society of Kennebunk, for the use and support of a minister of the Baptist denomination, and that the said two defendants, for themselves and the other surviving trustees named in the deed, and the other defendant as their servant, did the acts complained of and admitted by the defendant to have been done, as they might fully and lawfully do. To this plea the plaintiff replied, that when the alleged trespass was committed, he was the minister of the First Baptist Society of Kennebunk and in the possession and improvement of the premises described, as such minister, and by virtue of a lease from a committee of said society, they being also three of the trustees mentioned in the deed of George Taylor, and tendered an issue to the country, which was joined by the defendants. . . .

In trespass upon land, conveyed in trust, the trustees can maintain an action; but if the cestui que trust be in actual possession, he should be the plaintiff, though it is otherwise in ejectment. 1 Chitty's Pleadings, 49. An action can be maintained by a corporation, legally existing for any invasion of their rights in real estate, in the same manner that it could be done by an individual who should be the owner. But one who is neither trustee nor cestui que trust cannot maintain an action in his own name for the use of one or the other.

Assuming that the plaintiff was the minister of the society named in the deed, which is the cestui que trust, he cannot by virtue of that relation alone sustain the action for the use of that society, the minister not being, according to the terms of the deed, either trustee or cestui que trust. . . .

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## CLAYTON v. ROE.

(Supreme Court of North Carolina, 1882, 87 N. C. 106.)

SMITH, C. J. . . . It is conceded that where the right of entry is barred and the right of action lost by the trustee or person holding the legal estate, through an adverse occupation, the *cestui que trust* is also concluded from asserting a claim to the land. Lewin on Trusts, marginal page 604; Herndon v. Pratt, 6 Jones Eq. 327. And the correlative must be accepted that when the trustee is not barred, neither can the *cestui que trust* be, since as against strangers they are identified in interest. The alleged hostile possession by the defendant began after the death of the original trustee and when the legal state had descended, clothed with the trust to his infant children, and this disability prevents the statute from starting to run to their prejudice. This is true if the former statute governs (rev. Code, ch. 65, § 1,) or the substituted limitations contained in the Code. In both there is a saving of the rights of infants. C. C. P. § 27. . . .

## EWING v. SHANNAHAN.

(Supreme Court of Missouri, 1892, 113 Mo. 188, 20 S. W. 1165.)

Black, J. This is an action of ejectment for a lot in the city of St. Louis. The answer is a general denial and a plea of the statute of limitations. . . .

In the case now in hand the plaintiff took an equitable contingent remainder by force and effect of the deed of trust. Until the death of the donor, the entire legal title, a title in fee simple, was vested in the trustee. It was the duty of the trustee to protect the title for those who should take upon the death of the donor as well as for the donor during his life. To this end the entire legal title was vested in the trustee, and the right of possession was in him. As the trustee held the legal fee simple title and the right of possession for all of the beneficiaries, he was the proper person to sue for possession; and we think the case comes within the rule, that, where the trustee is barred by lapse of time, the beneficiaries are also barred, and that too, though the beneficiaries are minors. That which bars the legal title here bars the equitable title. The acceptance of a trust like this is not a meaningless affair, and, if the trustee has made breach of the trust and wronged the plaintiff, the remedy is against the trustee. The statute of limitations is one of repose, and should be applied in this case. . .

Our conclusion is that the statute began to run against both the legal and equitable title when defendant took possession; that the legal and equitable titles were both barred by ten years adverse possession, and this too though the owner of the equitable title was, during all that time, an infant. That defendant's possession has been adverse, and that too for a period of twenty years, cannot be questioned. . . .

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## ELLIOTT v. LANDIS MACHINE CO.

(Supreme Court of Missouri, 1911, 236 Mo. 546, 139 S. W. 356.)

Graves, P. J. Plaintiffs state that their suit is one in equity to declare a trust and to compel an accounting. . . .

In the case at bar we have a trustee conveying the legal title directly to the parties sued as defendants. Not only so, but such defendants had knowledge of the trust. They had been parties to the creation of the trust. The question that we have to decide, is, can the Statute of Limitations be successfully invoked against the beneficiaries under disabilities, because it has fully run against a trustee who has conveyed the legal title to the parties sued by the beneficiaries, when such parties had full knowledge of the trust? This state of facts has not been adjudicated by this court. The case law is not a unit upon the question. We are therefore left free to discuss the question from principle. We start with the doctrine, that one who knowingly takes title to property which is subject to a trust, himself becomes a trustee, *ex maleficio*. If in the case at bar the defendants Fleming and Dobyne knew that Mrs. Landis held this stock in trust, and with that knowledge bought it, then in my judgment they became trustees *ex maleficio,* and would have to account to the beneficiaries of the trust. . . .

In the case of Parker v. Hall, 2 Head, l. c. 645, the Tennessee court thus speaks: "As to the Statute of Limitations, it can have no operation in the case. When the cause of action accrued, the owners of these slaves were all under the disability of infancy, and one of them was still an infant at the institution of this suit; and upon the principles of Shute v. Wade, 5 Yer. 1, all are saved from the bar. The position that when the trustee is barred all the beneficiaries are barred, though they may be under disability, has no application here. That doctrine only applies where the trustee could sue, but fails to do so, as where a stranger intrudes himself into the trust estate and holds wrongfully, and adversely, both to the trustee and the beneficiaries. In such a case, if the trustee fail to sue and is barred, the beneficiaries, though infants, etc., are also barred. But here, George H. Parker the trustee and owner of the legal estate, had estopped himself from suing by his bill of sale. He had turned against his wards, and united with the defendant in a breach of trust. The wrong was to them, not to him. He could not sue for, or represent them. . . .

To our mind the distinction drawn by the Tennessee court is well taken. In other words, if the trustee by a conveyance undertakes to convey to a purchaser the property stripped of the trust, and such purchaser takes with knowledge of the facts, then beneficiaries under

disability have the right to sue within the statutory period prescribed, after disability has been removed. Such a case is different from one where the trustee has not so acted. It is different from the case of a person having some claim, who takes possession of real estate (trust property) and claims adverse possession, but in which act the trustee has not concurred by overt act. This is the distinction between the case at bar and the Missouri cases relied upon by defendants, and discussed supra. To hold that a trustee can join with a purchaser with notice, and convey the property stripped of the trust, is to open wide the door for fraud as against infant beneficiaries. We cannot subscribe to the doctrine urged by defendants. Its pernicious effects would be endless. Our court has not gone so far up to this date, as the cases cited can be clearly distinguished on the facts.

We, therefore, hold that the cause of action is not barred. . . .

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## AMERICAN NATIONAL BANK v. FIDELITY & DEPOSIT CO.

(Supreme Court of Georgia, 1907, 129 Ga. 126, 58 S. E. 867.)

In December, 1893, H. C. Tindall and others, owners of all the capital stock of the Macon Hardware Company, hereinafter called the "Hardware Company," a private corporation, filed their petition to a superior court of Bibb county, alleging the insolvency of the Hardware Company, and praying that a receiver be appointed to administer the assets of the corporation for the benefit of its creditors. The Hardware Company and its creditors, including the National Bank and the Exchange Bank, were made parties defendant to this petition. Thereafter the Exchange Bank, the National Bank, and numerous other creditors of the Hardware Company entered their appearance in said suit, set up certain claims against the Hardware Company, and asserted their rights to share in the distribution of its assets. On January 9, 1894, the court passed an order appointing said Tindall permanent receiver of the Hardware Company, and designated certain banks, among them, the Exchange Bank, and the National Bank, as depositories to receive, hold, and disburse the funds of the receivership, "provided that the said banks will pay the customary rates of interest on such deposits at the rate

of 5 per cent. per annum, if left in the banks for six months, and no interest to be charged for the last 30 days prior to said money being checked out; each bank to have 30 days' notice of the intention to check." Said order also provided that "the said receiver is hereby authorized and directed to make his deposits as aforesaid in his name as receiver, and no check shall be drawn against such deposits, except in his name as receiver, countersiged by the judge presiding of this court, except that checks drawn for expenses may be drawn without being countersigned by the judge as aforesaid, but the said checks shall specify for what expenses drawn." The Exchange Bank, the National Bank, and certain other named banks accepted said designation as depositories under the terms of said order. . . .

It is alleged in the petition that the Exchange Bank and the National Bank failed and neglected to comply with the requirements of the aforesaid order of the court, and paid, out of the funds deposited with them, various sums, aggregating $2,901.53 and $475.44, respectively, upon checks signed by "H. C. Tindall, receiver"; that none of said checks had upon them any statement with reference to expenses, and were not countersigned by the judge, as provided in said order; and that the receiver appropriated the money so withdrawn to his own use, and has never accounted for the same. . . .

BECK, J. 1. In the absence of notice or knowledge, a bank cannot question the right of a customer to withdraw a fund, nor refuse the demands of the depositor by check; and it is also true that, if money be deposited by one as trustee, the depositor, as trustee, has the right to withdraw it, and, in the absence of knowledge or notice to the contrary, the bank would have a right to presume that the trustee would appropriate the money when drawn to a proper use; but it is also true that, if a bank has notice or knowledge that a breach of trust is being committed by the improper withdrawal of funds, it incurs liability, becomes responsible for the wrong done, and may be made to replace the funds which it has been instrumental in diverting. The Supreme Court of Maryland held that a bank, which credited a check to the individual account of a named person, when the check itself stated that it was for "deposit to the credit of" the person named, with the word "trustee" added to his name, was liable for participating in the breach of trust in case of loss ensuing to the trust estate by reason of his drawing out the fund by checks on his personal account. In the case

referred to, the court said: "To deposit to the credit of Henry W. Clagett, trustee, was an explicit notification to the bank that Clagett was not the actual owner of the money. It was an equally explicit instruction to the bank not to place the fund to the credit of Clagett's personal account. . . . Knowing that the money was not Clagett's, but that it was payable to him, and to be deposited to his credit as trustee, the bank had no authority to place it to his individual credit; and, if loss ensued by reason of Clagett drawing the fund out by check on his personal account, the bank is liable to make restitution to the trust estate. The bank, in the eye of the law, participated in the breach of trust of which Clagett was guilty." Duckett v. Nat. Bank, 86 Md. 403, 38 Atl. 983, 39 L. R. A. 89, 63 Am. St. Rep. 513, citing Bundy v. Monticello, 84 Ind. 119. "If the bank participates with the trustee in a misappropriation of the funds, or knowingly permits such misappropriation to take place, it must answer to the beneficiary for loss thereby occasioned." 3 Am. & Eng. Enc. Law (2nd ed.) 832. See, also, cases cited supporting the text.

Much stronger is the reason for holding, in the case at bar, that the bank participated in the breach of trust, than in the case of Duckett v. Nat. Bank, supra. It was agreed in this latter case, in behalf of the bank, that if the bank had obeyed the direction given to it, and had opened an account with Clagett (the depositor) as trustee, still Clagett could have withdrawn the funds on checks appropriately signed, and could then have misapplied the money without involving the bank. But in the case at bar Tindall, the receiver, could not by checks, however appropriately signed by himself, unless they were also countersigned by the judge, have withdrawn the funds. Such were the express terms of the order or decree. The defendants knew the provisions made in the decree as to the manner in which checks, except checks for expenses, should be signed. They knew that they were depositories of trust funds, for the safeguarding of which extraordinary care and caution was being exercised by the court. We do not know by the use of what terms of direction, in a decree or order for the deposit of funds in a designated bank, more emphatic notification could have been given this defendant that payment upon any check, not countersigned as prescribed in this order, would amount to an aiding of a trustee in the misapplication of the funds. By the improper withdrawal of the funds Tindall was clearly guilty of a breach

of trust. The bank had knowledge of this breach of trust, knowing, as it did, the express terms upon which Tindall might check out the money—terms which, so far as affect the sum now sued for, were plainly violated. Having the knowledge that a breach of trust was being committed, by payment of the checks improperly drawn and not countersigned by the judge of the superior court, it aided in that breach, and in the consequent misapplication of the funds; and, having done so, it became liable to the beneficiaries of the trust—that is, to the creditors of the Macon Hardware Company, to whom Tindall sustained a fiduciary relation. . . .

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## TURNER v. HOYLE.

(Supreme Court of Missouri, 1888, 95 Mo. 337, 8 S. W. 157.)

BRACE, J. . . . That the promissory note pledged by Jamison as collateral security for the loan which defendant made him and for which he executed his individual note to the defendant was a part of the trust fund, that the plaintiff is the trustee of that fund, that the money obtained by Jamison was not applied to any of the purposes of the trust, but to his own use, is undisputed. But it is contended that the instrument creating the trust having conferred upon the trustee the power to change the character of the fund, the trustees had power to sell or vary the securities and in hypothecating the note as he did he conferred upon the defendant a perfect title, and could do so although the defendant may have known that the note was trust property. This point was not overlooked by the learned judge before whom the case was tried below, who furnishes an answer to this contention in the following language: "When a trustee with power to change investments, and professing to act on behalf and for the trust estate, induces a third person to buy from him trust property, or to advance upon it, the third persons acting in good faith will acquire a good title although the trustee convert the proceeds of the sale or advance to his own use. The third party acting under the circumstances stated, is not bound to see to it, that the proceeds of his purchase or advance are properly applied by the trustee. But this rule has no application when the trustee is not professing to act for or on behalf of the trust estate,

or the third party is not dealing with him in good faith, believing that the trustee is making the sale or getting the advance on behalf of the trust estate. In the case at bar the evidence shows that Jamison solicited Hoyle to make him a short loan upon good collateral. He did not mention the trust; he did not ask for a loan on behalf of the trust; he asked it for himself individually, and the loan was made to him individually. On the face of the transaction it was a clear case of the conversion by Jamison of a trust asset, for his individual purposes, and later developments proved that it was nothing else. Under these circumstances it would seem very clear that Hoyle cannot assert any title as against the present trustee if he took the note with notice that it was part of the trust property, or was chargeable with notice of that fact." . . .

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## SHOE & LEATHER NATIONAL BANK V. DIX.

(Supreme Court of Massachusetts, 1877, 123 Mass. 148.)

Contract against the makers of the following instrument:

"February 16, 1871, $53,000. For value received, we as trustees but not individually promise to pay to the Boston Water Power Company or order, the sum of fifty-three thousand dollars in five years from this date, with interest to be paid semi-annually, at the rate of seven per centum per annum, during said term, and for further time as said principal sum or any part thereof shall remain unpaid.

"Signed in presence of P. H. Sears.

Geo. P. Sanger,<br>
Joseph Dix,<br>
R. A. Ballou, } Trustees

"Secured by mortgage of real estate in Boston, duly stamped, to be recorded in Suffolk Registry of Deeds." . . .

Prior to February 16, 1871, there existed a private association of persons who agreed to act in concert together in purchasing real estate in this and the adjacent counties. This association made the defendants, who, with other persons, were then members thereof, its trustees to effect such purchases of real estate, with powers and duties concerning the same, substantially as set forth in the deed hereinafter

mentioned. On February 16, 1871, the association, through its said trustees, caused a purchase of property from the Boston Water Power Company to be effected, and the conveyance to be made to the defendants, "as they are trustees for the Brookline Avenue Associates as hereinafter set forth." "To have and to hold the granted premises, with all the privileges, easements and appurtenances thereto belonging, to the said Sanger, Dix and Ballou, as joint tenants and not as tenants in common, and to their heirs and assigns and to the survivor of them and his heirs and assigns forever, in trust nevertheless for the Brookline Avenue Associates for the following purposes: to take, hold, mortgage, lease, manage and improve the same according to the exercise of their best discretion, with full power in the trustees or trustee for the time being, in the exercise of such discretion, to sell at public or private sale any portion or the whole of the real estate hereby conveyed, and to make, execute and deliver good and sufficient deeds to convey the same in fee simple free from the trusts hereby created." . . .

Ames, J. The question whether the defendants have made themselves personally responsible must be determined by the terms of the note itself. In determining the proper interpretation of any written contract, the court will give full effect to all the terms in which it is expressed. Those terms will not be modified by extrinsic evidence tending to show that the real intention of the parties was something different from what the language imports. They will be taken in their plain, ordinary and popular sense, except where it may be qualified by some special usage, or where the context evidently shows that the parties in some particular case had a different intent. It is no part of the business of the court to make or alter a contract for the parties. Even if it be found that the contract, according to its true meaning, has no legal validity, or fails to become operative, it is not for the court, in order to give it operation, to suppose a meaning which the parties have not expressed, and which it is certain they did not entertain. It must be assumed that all the language used in the contract was selected with some purpose and is to be of some effect. If a party, therefore, in a contract into which he voluntarily enters, and not in the execution of any official trust or duty, makes it an express stipulation that he is acting for somebody else, and is in no event to be personally liable, he certainly cannot be rendered so by law. Sedgwick J., in Sumner v.

Williams, 8 Mass. 162, 184. In a question as to the meaning of a contract, the want of apt words to create a personal responsibility is not to be supplied by the alteration or enlargement of its terms.

In applying these familiar and elementary rules of construction to the case now before us, we find that the defendants promised "as trustees but not individually." The construction contended for by the plaintiffs would require us to strike out the words "but not individually;" although in so doing we should not only alter the contract, but should impose upon them a liability which apparently they took special pains to avoid.

It is to be borne in mind that this was not a case of agents acting for an undisclosed or unknown principal, and is, therefore, readily distinguishable from Winsor v. Griggs, 5 Cush. 210, and cases of that class. Neither was it an attempt by the defendants to bind property over which they had no legal control. By the terms of the deed they had power to mortgage, lease and manage the property at their discretion, but for the benefit and on the account of the equitable owners, namely, the members of the Brookline Avenue Association. In this respect the case differs from Thacher v. Dinsmore, 5 Mass. 299, Forster v. Fuller, 6 Mass. 58, and other cases of that class, in which a party promising "as guardian," etc. was held to have made himself personably liable.

Neither can it be said that the term "trustees" was used as "a mere description of the general relation or office which the person signing the paper holds to another person or to a corporation, without indicating that the particular signature is made in the execution of the office and agency." In this respect the case differs from Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101. It often has happened that an agent for another person, or the treasurer of a corporation, has made himself personally responsible, by the form of the words in which he has expressed himself in a written contract, when he may have intended to bind his principal only. Cases in which this question has been raised have often been before this and other courts, and the authorities have recently been collected and reviewed in several of our own decisions. See Slawson v. Loring, 5 Allen, 340; Barlow v. Lee Congregational Society, 8 Allen, 460; Tucker Manuf. Co. v. Fairbanks, *ubi supra*. But we believe no case can be found in which a promise "as trustee," &c., accompanied with an express disclaimer of personal liability, would fail to exempt him.

It is contended that if these defendants are not liable upon the contract as a note, then nobody is liable. Even if such were the fact, it would not be in the power of the court, as we have already seen, to alter the contract for the purpose of giving it validity. In deciding whether the defendants have or have not bound themselves, we need not decide whether they have or have not bound their principals. Abbey v. Chase, 6 Cush. 54. But, even if the written contract should fail of taking effect as a negotiable note, it might still be operative as an acknowledgment of unpaid debt, which the mortgage was intended to secure. It may be that this was all that the original parties intended. or supposed to be material. They may have considered the mortgage sufficient security, without the personal responsibility of the trustees.

Our conclusion therefore is that, without proof that the defendants, as trustees, have funds of the association in their hands appliable to this debt, no action can be maintained against them. No evidence to that effect having been offered, we must order, judgment for the defendants.

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## SECTION IV. RESULTING AND CONSTRUCTIVE TRUSTS

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### ACKER v. PRIEST.

(Supreme Court of Iowa, 1894, 92 Iowa, 610, 61 N. W. 235.)

DEEMER, J. The plaintiffs in the equity suit are the heirs at law of Elizabeth Priest, deceased, and the defendant Stephen C. Priest is their father. Mrs. Priest was a daughter of one Joseph Abrams. Joseph Abrams had one son and three daughters, besides Mrs. Priest. In the month of July, 1884, Abrams, who was then living in the state of Kansas, concluded to make a partial distribution and advancement of his property to his children. He was then the owner of two farms in Kansas, one of which was known as his "Home Farm," and the other was occupied by defendant Priest and his family. Thomas W. King, another son-in-law, owned and occupied another and a third farm in the same county as the other two. In order to carry out his

purpose, and make an equal distribution of property to his daughters, Abrams made arrangements with King to exchange the "home farm," valued at eight thousand dollars, for the King place, at the agreed price of four thousand dollars. Prior thereto, however, Abrams had had a conversation with defendant Priest, in which he told him he intended to give him a farm. After making arrangements with King, Abrams informed defendant that he had an opportunity to trade the "home farm" for King's land and directed defendant to go and look at the farm, and if it suited him he (Abrams) would make the exchange. Defendant, after examining the place, was pleased with it, and so informed Abrams, and Abrams made the contemplated exchange. Abrams deeded the home farm to King, and King, by direction of Abrams, and with the knowledge, direction, and consent of the deceased, Mrs. Priest, made a deed to his place to the defendant Priest. This last deed was a warranty deed, in the usual form and for the expressed consideration of four thousand dollars. Shortly after the making of these deeds, the defendant moved onto the King farm and used and occupied it for a year or more, when he sold it, and with the proceeds purchased a farm in Cass county, Iowa, from one Isabella Goodale. The deed to the Cass county land was taken in the name of the defendant with the knowledge and consent of his wife. Defendant and his wife immediately took possession of the Cass county land, and occupied and used the same until the death of the wife, in April, 1888. After the death of the wife, and in May 1891, the defendant sold the land in Cass county, and at the time of the commencement of this suit was in possession of a large part of the proceeds of the sale. Plaintiffs claim that the defendant at all times had the title to the Kansas land and to the land in Cass county in trust for his wife, Elizabeth V. Priest, and that they, as her heirs at law, are entitled to have a trust impressed upon the funds now in the hands of the defendant, arising out of the sale of the Cass county land. Defendant Isaac Dickerson was made a party to the suit because of his having possession of some of the funds arising from the sale of the land in this state. . . .

Plaintiffs do not—nor, indeed, could they, under the statutes of either Kansas or of this state—claim an express trust in the fund, or the proceeds thereof. Their claim is that from the transaction between the parties, as proved, there arose an implied, a resulting, or a constructive trust, which the law will recognize and enforce. We turn,

then, to the evidence, and find that while it was the intention of Abrams to make a partial distribution of his estate among his heirs, yet it did not appear to him to be important to whom he made the deeds—whether to his daughters, in their own names, or to their husbands. The deed to the home farm was made to King, the husband of one of his daughters, and the deed to the King farm was made direct to defendant Priest. Abrams had previously spoken to defendant about giving him a farm, and while the deed was, no doubt, made so as to place all his children on an equality, it is quite evident to us that it was wholly immaterial to him to whom the deed should be made. Before having the deed made to defendant, Abrams spoke to his daughter, Mrs. Priest, about how the deed should be made, and "she said to make it to her husband; it was all the same." Again, Abrams testifies, "My daughter gave no reason (for making the deed to her husband), except that it would be all right, recognizing him as her husband." Even if Abrams intended the deed to be for the benefit of Mrs. Priest and her children, as he says, he did not so state to defendant, and defendant had no knowledge but that he was to take the beneficial as well as the legal estate. Abrams directed King to make the deed to defendant, and King had no conservation whatever with defendant.

Applying these facts to the statutes of Kansas, before quoted,[1] with reference to the creation of trusts, and it is clear that defendant took an absolute title to the land deeded him by King, unincumbered with any trust. It is contended, however, that the laws of Kansas have no application to this case, that the statutes above quoted relate simply to the remedy, and that the *lex fori* governs. Without deciding this question, so far as it relates to the statute of frauds, for it is not necessary to a determination of the case, and passing it with the single remark that where the statute relates simply to the remedy, and does not make the parol contract void, as is the case with the statute in question, there is much force in appellants' position, we are clearly of the opinion, however, that the other statutes with reference to the creation of trust estates are binding, for they go to the validity and

[1] Gen. W. Kan. 1868, c. 114, § 6; When a conveyance for a valuable consideration is made to one person, and the consideration thereof paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former, subject to the provisions of the next two sections.

operation of the contract, and of the alleged trust in the land. It is familiar doctrine that the law of the place where the contract is made is to govern as to its nature, validity, obligation, and interpretation, and the law of the forum as to the remedy. Bank v. Donnally, 8 Pet. 361; Scudder v. Bank, 91 U. S. 406; Burchard v. Dunbar, 82 Ill. 450. It is also everywhere acknowledged that the title and disposition of real property are exclusively subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another. Korr v. Moon, 9 Wheat. 565; McCormick v. Sullivant, 10 Wheat. 196. And a title or right in or to real estate can be acquired, enforced, or lost only according to the law of the place where such property is situated. Benttely v. Whittemore, 18 N. J. Eq. 373; Hosford v. Nichols, 1 Paige, 220; Williams v. Maus, 6 Watts, 278; Wills v. Cooper, 2 Ohio, 124.

If we are correct in our premises, it necessarily follows, as a conclusion, that under the laws of Kansas there was no trust created by law in the Kansas land, even if it be said that Mrs. Priest furnished the consideration paid for the land, because there was no agreement on the part of the defendant that he should hold the title in trust for his wife. . . .

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## LONG v. MECHEM.

(Supreme Court of Alabama, 1904, 142 Ala. 405, 38 So. 262.)

SIMPSON, J. This is an appeal from an interlocutory decree overruling demurrers and a plea. The original bill was filed to remove a cloud from the title of complainant, and was afterwards amended by adding a section setting up a resulting trust, but making no additional prayer.

The first assignment of error is based on the overruling of the plea; the substance of the plea being that the trust set up in the amended bill was not in writing, and consequently void, under section 1041 of the Code of Alabama of 1896. The allegations of the amended bill show that the land in question was bought and paid for by the complainant, and the title taken in the name of one Duncan, under an agreement that Duncan was to hold the legal title for complainant, and to convey the land, whenever desired, under complainant's direc-

tion. The contention of the respondent is that the fact that there was a parol agreement in regard to said trust takes it out of the category of resulting trusts, and that it is therefore void. If the complainant had a resulting trust in the lands, from having paid the purchase money and placed the title in the name of another, the mere fact that the party in whom the legal title was vested recognized by parol the obligation to hold the land in trust certainly could not destroy the resulting trust held by the complainant by operation of law. In addition to this, the section of the Code provides that no trust in lands not in writing is valid, "except such as results by implication or construction of law, or which may be transferred or extinguished by operation of law." The inevitable result from the grammatical construction of the sentence is that this class of trusts is excepted entirely from the operation of the section, and parol declarations of the parties regarding the same are admissible. The distinction between this case and such cases as Patton v. Beecher et al., 62 Ala. 579, and Brock v. Brock, 90 Ala. 86, 8 South 11, 9 L. R. A. 287, is that these cases correctly hold that the "mere verbal promise by the grantee of a deed for land, absolute on its face," will not take it out of the requirements of the statute, while this case comes under another principle of law, equally well established, and recognized in the exception contained in the statute under consideration, to wit, that "if the purchaser of lands, paying the purchase money, takes the conveyance in the name of another, the trust of the lands results by construction to him from whom the purchase money moves." Lehman et al v. Lewis, 62 Ala. 129, 131; Tillman v. Murrell et al., 120 Ala. 239, 24 South, 712. It is true that in the last-named case, as counsel for appellant say, the lands had been conveyed in accordance with the parol agreement; but the case was decided distinctly on the principle that Murrell held the legal title in trust for the party who paid the money for it, "not by virtue of the parol agreement, but because of their having paid the consideration." . . .

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## ROSSOW v. PETERS.

(Supreme Court of Illinois, 1917, 277 Ill., 436, 115 N. E. 524.)

FARMER, J. This is a bill in chancery filed by John Rossow to declare him to be the equitable owner of a house and lot in Chebanse,

Illinois, and to compel the defendant William G. Peters, who held the legal title, to convey the premises to complainant. The bill was filed in October, 1915. Rossow died in January, 1916, before the cause was heard, leaving a last will and testament, making his widow, Sophia M. Rossow, sole beneficiary and executrix of his will. After his death she was substituted as party complainant.

John Rossow was the father-in-law of Peters, whose wife was Rossow's only child. At the time of his death Rossow was seventy or more years of age. He was an ignorant, illiterate man and for some years had been an employee of his son-in-law. In March, 1906, he contracted for the purchase of a house and lot in Chebanse for a consideration of $1300 and paid $100 in cash. He and his wife moved into the property before the deed was made, March 17, 1906. He lived in the property with his wife until her death and continued to occupy it until August, 1914, when he married again and went to live in property owned by his wife. The bill alleges that the deed to the property Rossow purchased was made to his son-in-law without Rossow's knowledge. This is denied by the answer. The defense set up by the ansewer is that Rossow had creditors, and that he had the deed made to his son-in-law to defraud his creditors. . . . The only creditor the proof tended to show Rossow had was a man named Steifel, to whom he owed $200, and Rossow testified he paid him off some years before his deposition was taken.

If it be conceded that it was proven by competent testimony that Rossow said he had the deed made to Peters to hinder and delay his creditors, was it, in fact, a fraud? The bill alleged, and the proof sustains the allegation, that Rossow resided in the property as his homestead from about the first of March, 1906, (which was before the deed was made,) until August, 1914, and that since leaving it he had collected the rents from it. He paid all taxes and assessments against the property from the time he bought it and at his own expense made all necessary repairs. He was entitled to a homestead to the extent in value of $1000, which creditors could not take from him. He only put $900 cash into the property at the time he bought it. A homestead of the value of $1000 is exempt from sale for the payment of debts, and the owner of it may convey it without interference from his creditors. When the deed was made Rossow's interest was not liable to creditors, and if Rossow had taken the title in his own name he

could have conveyed it free from their interference. Whatever he may have thought about it, he did not defraud creditors by having the deed made to Peters.

Cases involving conveyances made to defraud or hinder and delay creditors have usually been suits begun by the creditor, and in all such cases it has been held a conveyance of property exempt from the payment of debts is not fraudulent as to creditors. A creditor has no interest in the disposition of such property and is not hindered or delayed by its conveyance. Washburn v. Goodheart, 88 Ill. 229; Moore v. Flynn, 135 id. 74; Nance v. Nance, 5 Am. St. Rep. 378; Bogan v. Cleveland, 20 id. 158.) Even the fraudulent acts of the party entitled to a homestead are not allowed to divest that right. (Gruhn v. Richardson, 128 Ill. 178.) That can only be accomplished in the manner provided by statute. (Leupold v. Krause, 95 Ill. 440; Hamby v. Lane, 89 Am. St. Rep. 967.) "A debtor, in the disposition of his property, can commit a fraud upon his creditors only by disposing of such of his property as the creditors may have the legal right to look to for the satisfaction of their claims, and therefore a debtor cannot commit a fraud upon his creditors by disposing of his homestead." (20 Cyc. 385.) The most that can be claimed for the proof here is, that Rossow had one creditor to whom he owed $200 at the time and that he had the property conveyed to his son-in-law for that reason. The property, at the time of the conveyance, being exempt from the claim of creditors, they had no interest in it and were in no way injured or defrauded by it.

It may be said Rossow intended by the conveyance to defraud his creditor, and although that was not its effect he cannot compel a reconveyance. In other words, that a conveyance made with intent to defraud creditors, although the conveyance was of property exempt from the claims of creditors, and was therefore no fraud upon them, can no more be set aside and the grantor invested with the title than if the transaction had operated to defraud or hinder and delay creditors. On this question the cases are conflicting. "Some decisions hold that such conveyance is fraudulent and the property cannot be recovered by the grantor, while others hold that since none is harmed but the grantor it should not be deemed a fraudulent conveyance and he should be permitted to recover the property so conveyed." (12 R. C. L. 611.) The decisions will be found collected in a note to Carson v. Beliles,

1 L. R. A. (N. S.) 1007. As to a debtor's homestead there are no creditors and there can be no fraudulent disposition of it. (Ferguson v. Little Rock Trust Co. 99 Ark. 45; Ann. Cas. 1913a, 960.) The obvious reasons for this rule against the grantor attacking a conveyance made by him in fraud of the rights of creditors do not obtain where no creditors or third persons are injured or defrauded, and under the circumstances of this case as disclosed by the proof we think the rule cannot be invoked against the relief prayed for in the bill. . . .

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## McDONOUGH v. O'NIEL.

(Supreme Court of Massachusetts, 1873, 113 Mass. 92.)

GRAY, C. J. The decision of this case depends upon the application to the evidence of well settled rules of equity jurisprudence.

Where land conveyed by one person to another is paid for with the money of a third, a trust results to the latter, which is not within the statute of frauds. It is sufficient if the purchase money was lent to him by the grantee, provided the loan is clearly proved. And the grantee's admissions, like other parol evidence, though not competent in direct proof of the trust, are yet admissible to show that the purchase money, by reason of such a loan or otherwise, was the money of the alleged cestui que trust. Kendall v. Mann, 11 Allen, 15 Blodgett v. Hildreth, 103 Mass. 484. Jackson v. Stevens, 108 Mass. 94. In equity, a conveyance absolute on its face may be shown by parol evidence to have been intended as a mortgage only, and its effect limited accordingly. Campbell v. Dearborn, 109 Mass. 130. The findings of a master in matters of fact are not to be reviewed by the court, unless clearly shown to be erroneous. Dean v. Emerson, 102 Mass. 480. And in equity, as at law, the omission of a party to testify in control or explanation of testimony given by others in his presence is a proper subject of consideration. Whitney v. Bayley, 4 Allen, 173.

It appears and is not controverted that the deed was made by Godfrey to the defendant, whose wife was the testator's sister: that the purchase money $3000, of which the testator furnished $300 of his own money, and $200 borrowed by him of Mrs. McGovern, upon a note signed by himself and the defendant; the defendant furnished

$600 of his own money, and $400 borrowed of Dolan upon the defendant's note; and for the remaining $1500 the defendant gave his own note, secured by mortgage on the premises, to Clements, who held a previous mortgage for a like amount, and who testified that before the purchase the defendant came to see if that mortgage could lie on the property, and told him that he was going to buy the land for the testator, and was told by the mortgagee that he must give a new mortgage, as he afterward did, in discharge of the old one. The will recites that the defendant held a deed of certain real estate in trust for the testator's benefit, and had paid certain sums of money on his account, and directs that all such sums of money, with interest, should be paid back to him, and he should then convey the property in fee to the testator's wife. The attorney who drew the will certifies that he read this part of it in the testator's presence, and before its execution, to the defendant, and asked him if it was right, and he said it was, and upon being asked what claims he had against the place, answered $600, besides $100 for repairs and $44.08 for taxes, and that he had received from the testator the whole amount with interest of the note to Dolan, except $80, and that the testator had paid the note to Mrs. McGovern. The other material testimony may be taken as stated on the defendant's brief, namely, that the defendant repeatedly "admitted that he bought the place for John B. McDonough and that he meant to assist or help him;" that "the defendant said McDonough wanted him to buy the place for him," "that he had always wanted John to take the deed, but he had not paid up;" and "that he was ready to fix up the place when McDonough was ready to pay up." The master also reports that the defendant was present at the hearing before him but did not offer to testify.

From this evidence the master, who heard all the witnessess, was warranted in finding as matter of fact that the money paid by the defendant for the land was lent by him to the plaintiff for the purpose, and that thus the whole purchase money was the plaintiff's money. Upon examination of the whole evidence, we see no sufficient cause for reversing the conclusion of the master, and taking the facts as found by him; the inference of law follows that there was a resulting trust in favor of the testator, and that there must be a decree for the plaintiff.

## CARTWRIGHT v. WISE.

(Supreme Court of Illinois, 1853, 14 Ill. 417.)

CATON, J. . . The question then arises, whether a father, who purchases land with his own money, and takes the title to his idiot son, can file a bill for a resulting trust, and claim that he did not intend it for the benefit of his son, but for his own use? We are prepared to say that such a bill cannot be sustained. It must be held to be an advancement in favor of the child, (Taylor v. Taylor, 4 Gil. R. 304; Bay v. Cook, 31 Ill. R. 345.). The policy of the law requires that such advancement thus made to such a party, should be held to be irrevocable by the father. A contrary rule would open too wide a door for the revocation of advancements to those who have such a peculiar claim upon the bounty and protection of a father. The very idea of selecting an idiot for a trustee, is absurd. He must be incapable of executing or discharging any duty in relation to it; and the very suggestion indicates insanity, or a contemplated fraud on the part of the father.

Let the decree be affirmed.

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## HALL v. HALL.

(Supreme Court of Missouri, 1891, 107 Mo. 101, 17 S. W. 811.)

MACFARLANE, J. The petition contains two counts. The first is ejectment to recover about twenty-eight acres of land in Andrew county. The second is in equity, in which plaintiff alleges that defendant is his father, and on the sixth day of January, 1866, plaintiff was an infant living with him and in his family; that on said day one Beecraft conveyed to plaintiff the land in controversy by good and sufficient deed, which was delivered to defendant, who took the same into his possession to keep and hold for plaintiff; that afterwards defendant fraudulently, and without the knowledge or consent of plaintiff, erased the name of plaintiff as grantee therein and inserted

his own, and had the deed as so changed, recorded; that the deed, as recorded, constituted a cloud upon plaintiff's title. The prayer was that the cloud be removed and plaintiff's title be decreed.

The answer was a general denial, and a special defense in which it was set up that defendant paid the full amount of the purchase price for the land, a part of which belonged to his brother, Jesse Hall who was then absent from the state; that he bought the land for his own use and benefit; that he had lived on it, making it his home from the date of the purchase to the present time; that at the time of purchasing the land plaintiff was an infant, under two years of age, paid no part of the purchase money, and no deed was made to him or for his benefit. The case was tried to the court without a jury.

The evidence shows a state of facts that do not commend plaintiff for his filial regard for his father. It shows that for some years prior to the date of this deed defendant had lived on this small tract of land presumably as a tenant; that on that day he bought the land from Beecraft, for which he paid him $560, which appears to have been about all his possessions. When the deed was written, defendant directed the writer to insert the name of Jesse Hall as grantee therein. This was done, and the deed delivered to defendant, who retained it until about 1870, when he erased the name Jesse, and inserted instead that of John, thus making himself the grantee. A few years thereafter he had the deed recorded. From the date of the deed in 1866 to the commencement of this suit he occupied and used the land as his homestead, made improvements, and paid the taxes thereon.

These facts are substantially undisputed. Plaintiff testified that prior to 1860, himself and his brother Jesse had worked together dividing the earnings; that his brother left home in 1860, leaving in his hands some property, the proceeds of which constituted a part of the consideration paid for the land, and on that account he had the deed made to him in order to secure this money; that hearing of the previous death of his brother he changed the deed. The evidence, however, that the deed was deliberately made to the plaintiff, then under two years of age, we think greatly preponderated.

The court gave some and refused other declarations of law, but as the defense was equitable the legal questions can be considered without setting out in detail these instructions. The court gave one intended to make the deed to his brother Jesse Hall, the finding should

be for defendant; and refused one asked by the defendant to the effect him. The court also gave a declaration that, if the deed was not made to plaintiff as an advancement, he could not recover. The verdict and judgment were for plaintiff and defendant appealed. . . .

The deed in question was unconditional in its terms, and, at the time it was executed and given into the hands of defendant, plaintiff was less than two years of age, and was wholly without discretion, either to accept or reject it. Under such circumstances the deed being declaration of law to the effect that, if the defendant at the time beneficial to the infant, the rule is almost universal that the acceptance that the evidence failed to show such a delivery of the deed to or for the benefit of plaintiff as was necessary in order to vest the title in will be presumed. . . .

The conclusion being irresistible that the deed was intended, by both the grantor and defendant who paid the purchase money, to operate as a transfer of the title to plaintiff, the next inquiry is whether it operated as a fee-simple conveyance and as an advancement, or was there a resulting trust in favor of defendant. The rule is that where one pays the purchase money, but the title is taken in the name of a stranger, the party taking the legal title will, under certain circumstances, hold the title in trust for him who paid for the land. The presumption of a resulting trust in favor of the purchaser is rebutted in case the conveyance is made, under like circumstances, to one to whom he is under some moral or legal obligation, as wife or child. In such case the conveyance will be taken to have been intended as an advancement. Darrier v. Darrier, 58 Mo. 226; Whitten v. Whitten, 3 Cush. 191; 2 Story, Eq., sec. 1201.

This rebutter of the presumption of a resulting trust, arising from the relation of the parties to each other, will itself be overcome when all the facts and circumstances antecedent to, or contemporaneous with, the transaction point clearly to an intention on the part of the purchaser to create a trust. Darrier v. Darrier, supra; Peer v. Peer, 11 N. J. Eq. 432; Persons v. Persons, 25 N. J. Eq. 250; Taylor v. Taylor, 4 Gilm. 303; Dudley v. Bosworth, 10 Hump. 12; Tremper v. Barton, 18 Ohio, 418. Whether this conveyance carried with it a resulting trust depended altogether upon the intention of defendant when he bought the land, paid the purchase money, and directed the name of plaintiff inserted in the deed as grantee. This intention

can be shown by parol evidence as such trusts are not within the statutes of frauds. See authorities supra.

There are many circumstances which to our minds tend strongly to rebut the presumption that the coveyance in this case was intended as an advancement. So far as appears from the record this was the bulk of the property owned by defendant at the time; a part of the money used belonged to his brother; he had lived on this little tract previously, and evidently bought it for a home for himself and family, and no provision was made for his wife or other members of his family. The disposition of all his property for the benefit of one child is not consonant with common sense or common justice. If the conveyance was intended to carry with it a trust in favor of plaintiff it could make but little difference whether the deed was made to brother, or son of defendant. The principal difference would be in the fact that the burden of proof, to establish the trust in the child, would rest upon defendant, while a presumption of a trust would exist if the legal title had been taken in the brother. . . .

It is true a declaration of law was given submitting the question of fact, as to whether the deed was made to plaintiff by direction of defendant, with the intention of having it treated as an advancement, but we think one should also have been given on the hypothesis that the deed created a trust in favor of defendant. The first instruction asked by defendant was doubtless intended to submit that theory of the defense, but omitted the vital and controlling fact as to the intent of the purchaser, and was properly refused. . . .

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## IN RE DAVIS.

(United States District Court, 1901, 112 Fed. 129.)

Lowell, D. J. I find the facts in this case, to be as follows: Mrs. Sullivan paid the entire original consideration for the property and since the purchase has paid off mortgages thereon to the amount of $1,600. She never intended to take by the conveyance any title to the property, legal or equitable. Had she so intended, there was nothing to prevent her from substituting her name for her daughter's in the deed as prepared, which could have been done without expense. She

intended the entire equitable estate for her grandchildren's benefit especially for their education. She never intended her daughter to take any beneficial interest in the property. . . . I have to determine whether a trust results in favor of the person paying the consideration when that person distinctly intended that the entire beneficial interest in the property should vest in another not the grantee, and intended that no interest, legal or beneficial, should vest in herself. Where one pays the consideration for real estate and the title is taken in another, a trust in favor of the one paying the consideration is presumed to result. If the grantee is a child, a counter presumption arises. But none of these presumptions are conclusive, and are all controlled by the circumstances of the particular case. . . .

The doctrine of a resulting trust in favor of the person paying the purchase money of an estate is stated in Anonymous, 2 Vent. 361 (in 1 Vern. 366, the case is named Bird v. Blosse):

"Where a man buys land in another's name, and pays the money, it will be in trust for him that pays the money though no deed declaring the trust, for the statute of 29 Car. II., called the 'Statute of Frauds,' doth not extend to trusts raised by operation of law."

A century later Lord Chief Baron Eyre thus explained the doctrine in the opinion of the court of exchequer:

"The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchaser and others jointly, or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive,—results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law that, where a feoffment is made without consideration, the use results to the feoffor." Dyer v. Dyer, 2 Cox, 92, 93, 1 White & T. Lead. Cas. Eq. 203, 205.

The trust is presumed to result from the circumstance of payment alone. It results, even if the grantee had no notice of the conveyance, and though he made no agreement, oral or written, to hold the estate in trust. To create the trust, there need be nothing savoring of fraud or misrepresentation or mistake. The trust is not fastened upon the conscience of the legal owner by an action or inaction of his. It arises, as is said in the statute of frauds, by operation of law. The trust may arise in an aliquot part of the property conveyed, or in an estate therein less than a fee simple. The nature and extent of the beneficial interest which passes to the person paying the purchase money may be

shown by parol. The trust in favor of the purchaser which is presumed to result may itself be rebutted by parol.

The trust in favor of the grandchildren which was intended by Mrs. Sullivan is enforceable against Mrs. Davis or it is not. Let us suppose that it cannot be enforced. From the payment of the purchase money by Mrs. Sullivan a trust is presumed to result in her favor. How does the trustee in bankruptcy of Mrs. Davis seek to rebut this presumption? Mrs. Davis is Mrs. Sullivan's daughter and from some relations a rebutting counter presumption arises in favor of the grantee. It is doubtful, however, if this counter presumption arises from the relation of mother and daughter. See Murphy v. Nathans, 46 Pa. 508; Sayre v. Hughes, L. R. 5 Eq. 376; Johnson v. Wyatt, 2 De Gex, J. & S. 18; Bennet v. Bennet, 10 Ch. Div. 474; In re Orme, 50 Law T. (N. S.) 51. In any case the counter presumption in favor of a grantee who is the child of the purchaser even where it exists, "is not a presumption of law, but of fact, and can be overthrown by proof of the real intent of the parties." Institution v. Meech, 169 U. S. 398, 407, 18 Sup. Ct. 396, 400, 42 L. Ed. 793, 798. "The circumstance of one or more of the nominees being a child or children of the purchaser is to operate by rebutting the resulting trust; and it has been determined in so many cases that the noniee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence." "Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side." Dyer v. Dyer, above cited. As it is abundantly clear that Mrs. Davis was intended to take no beneficial interest in the estate, her relation to Mrs. Sullivan is unimportant, and the case must be decided as if she were a stranger in blood. The trustee thus stands in the place of a grantee who seeks to rebut the presumption that the trust results to the purchaser, and seeks to do so by showing that a trust was intended in favor of a third person, which trust is not enforceable against the grantee. The grantee thus claims the entire beneficial interest in the estate, of which she would otherwise have taken nothing, by showing that a beneficial interest was intended in some one else. She claims a beneficial interest in property because of the expressed intent that she should take no

beneficial interest therein. If the purchaser had said nothing, the grantee would have taken nothing. Because the purchaser has said that the grantee is to take nothing, the grantee claims to take everything. This does not appear to be equitable. . . .

Again, it is settled that, upon an oral declaration by the purchaser that the grantee is to take the beneficial interest in part of the estate he will do so, and the beneficial interest in the remaining part will pass by way of resulting trust to the purchaser. The expression by the purchaser of an intention that the grantee shall take only a part, causes a trust in the rest of the estate to result. Rider v. Kidder, 10 Ves. 360; Cook v. Patrick, 135 Ill. 499, 26 N. E. 658, 11 L. R. A. 573. Why should a declaration that a grantee is to take nothing defeat the resulting trust, and cause him to take everything? Still again, it is settled that, where a trust is validly declared in only a part of the estate conveyed, the rest of the estate will result to the purchaser; and the like happens where a trust is declared in the whole estate, but fails in part. It is hard to say why the failure of a valid trust, once created, should inure to the benefit of the purchaser, while a failure to create a valid trust inures to the benefit of the grantee. . . . Let us suppose that Mrs. Sullivan had become bankrupt, instead of Mrs. Davis, and that the trustee of Mrs. Sullivan sought to recover the property from Mrs. Davis, while the latter was trying to carry out the intention of Mrs. Sullivan for the benefit of the grandchildren. Even in that case, it must still be said that Mrs. Sullivan's intention was not to rely upon Mrs. Davis' honor, but to impose on her a binding trust. If that intention failed, and if the trust did not bind the grantee, the person paying the purchase money would naturally prefer to take into her disposition the property for which she had paid, rather than to leave it altogether in the disposition of the nominal grantee. If, therefore, the trust in favor of the grandchildren was not validly declared, there was a resulting trust in favor of Mrs. Sullivan. . . .

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## GLIDEWELL v. SPAUGH.

(Supreme Court of Indiana, 1866, 26 Ind. 319.)

RAY, J. . . . The first section of "an act concerning trusts and powers," (1 G. & H. 651,) provides that "no trust concerning

lands, except such as may arise by implication of law, shall be created, unless in writing, signed by the party creating the same, or by his attorney, thereto lawfully authorized in writing."

The sixth section of the act declares that "when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." One of those provisions, or rather exceptions named to the rule, is the case made by the evidence offered, to-wit: "Where it shall be made to appear that by agreement, and without any fraudulent intent, the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land, or some interest therein, in trust for the party paying the purchase money, or some part thereof." Without the statute, the trust would be implied without proof of the agreement to hold in trust, but under the statute, the trust does not result, unless the express agreement to thus hold be superadded. . . .

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## CARLL v. EMERY.

(Supreme Court of Massachusetts, 1888, 148 Mass. 32, 18 N. E. 574.)

DEVENS, J. The checks which were indorsed by the plaintiffs to the defendants, for the proceeds of which the defendants agreed to account to them, were so transferred, as the evidence tended to show, with a view to delay and defraud the plaintiffs' creditors, and of this purpose both parties were cognizant. At a subsequent period the plaintiffs went into insolvency, and sought to avail themselves of the property for the purpose of satisfying their creditors to the extent of its value. For this purpose they demanded the proceeds of the checks of the defendants, who were apprised of the intention of the plaintiffs, and of the object to which such proceeds were to be devoted. The defendants having refused this demand, the plaintiffs, who had made an offer of compromise to their creditors, paid into the Court of Insolvency a sum which exhausted all their assets, including the amount of the checks transferred to the defendants' This sum was obtained partly by a loan made to them by one Chase, to whom they

assigned their claim against the defendants for the proceeds of the checks, and for whose benefit this action was brought.

The defendants requested an instruction to the jury, that, if they were satisfied on all the evidence that the checks were transferred to them "in order to prevent the plaintiffs' creditors from reaching the same by attachment or other legal means, or to hinder and delay said creditors in their lawful attempts to avail themselves of said checks or the proceeds thereof in payment of their lawful demands, this action cannot be maintained." This request was refused, and the jury was instructed: "If the jury find that the defendants received those checks to have them cashed for the benefit of the plaintiffs, and received the money therefrom, and the plaintiffs thereafter demanded the same of the defendants for the purpose of paying a composition made in insolvency with their creditors, of which purpose the defendants were apprised, and the defendants refused to pay over said money to the plaintiffs or their order, then this action may be maintained, although the said checks were originally placed in the hands of the defendants for collection, in order to hinder, delay, or defraud creditors."

We have no occasion to consider whether the defendants could have been permitted to defeat the contract they had made by proof that they had participated in a fraud upon the plaintiffs' creditors, or whether the transaction described in the request was not valid between the parties, and thus that it could have been avoided only by creditors, or whether even creditors could have avoided it, having themselves received the proceeds of the checks. All these questions have been repeatedly considered by this court. Knapp v. Lee, 3 Pick, 452; Dyer v. Homer, 22 Pick. 253; Oriental Bank v. Haskins, 3 Met. 332; Crowninshield v. Kettridge, 7 Met 520; Brown v. Thayer, 12 Gray, 1; Harvey v. Varney, 98 Mass. 118.

The instruction as given was sufficiently favorable to the defendants. It was in substance that if one of two parties to a transaction, fraudulent as to creditors, has transferred property to another, no consideration having been paid, he may recede from the transaction on notice to the other party, repossess himself of his property, and devote it to its proper purposes. That a fraudulent transaction may be purged of the fraud by the subsequent action of the parties is well settled. Thus, if the checks transferred to the defendants, had been fully paid for to the

plaintiffs, and the sum had gone to the plaintiffs' creditors, the transaction would have been purged of fraud and the defendants would have had a good title thereto. Thomas v. Goodwin, 12 Mass. 140. Oriental Bank v. Haskins, 3 Met. 332.

It would seem equally clear, that, when a party who has transferred property to delay or defraud creditors abandons his fraudulent purpose, apprising the other party thereof, and seeks to reinstate himself in the possession of his property in order to pay his creditors, he may do so. It cannot be that the other party, who has been a participant in the fraudulent transaction by reason of such participation should be able to hold the property the possession of which he had so acquired, and thus prevent it from being devoted to its legitimate uses.

Judgment on the verdict.

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## IN RE WEST.

(Supreme Court of Judicature, (1900) 1 Ch. D. 84.)

KEKEWICH, J. A difficult question arises in this case. The testatrix has given her real and personal property to certain persons as trustees, but the trusts declared do not exhaust the property. The question is what is to be done with the part not required to satisfy the trusts. It is impossible to say that because property is given to persons as trustees they therefore take no beneficial interest. That is contrary to all experience of the construction of wills, there being many instances of trustees taking beneficially. Nevertheless, there is a presumption that a gift in trust is not a beneficial gift. It is, however, not uncommon to find a gift of a fund charged with certain payments, or coupled with a condition that a certain amount be paid to a third person. Whether the charge takes effect by way of trust or condition, it is not intended to do more than give a certain amount out of the fund to another person. There are numerous cases of that kind.

In Croome v. Croome W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814), the Court of Appeals, besides applying the rule, in King v. Denison, 1 V. & B. 260; 12 R. R. 227, to the will

before them, took the opportunity of laying down a rule in their own language.

Cotton, L. J., says (59 L. T. 584, 585): "I think Mr. Theobald has stated the correct rule to be applied in this case, which is, whether this is a devise for a particular purpose—by which I mean for that particular purpose only—or whether it is a devise subject to certain purposes described as trusts or charges. That I think is the rule laid down by Lord Eldon in King v. Denison, 1 V. & B] 260; 12 R. R. 227. What he says is this: 'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more'—that is to say, exclusively for that purpose—and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir." He means where it is given for the particular purpose only; but where it is given subject to a particular purpose, then what is not required for the purpose of fulfilling that purpose remains to the devisee, it not being imposed on him as a trust or as a charge. It is very true that the charges created by the words of this will do extend till they are satisfied, and charge the whole of the estate, but that, to my mind, is not the question. Now, in construing, we have to see what is the effect of the words—whether they create a devise for a particular purpose only, or a devise subject to the performance of a particular purpose. I think it is the latter." . . .

That is the pith and marrow of the whole matter. Are the donees in trust trustees in respect of the whole property given, or only in respect of the part that is given to others?

I have now to apply that test to the particular will. There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I might still find the trustees were intended to take beneficially. The trust for sale is in the ordi-

nary form, and the donees contend that it is mere machinery. . . . But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally. A somewhat finer point arises on the direction that the trustees shall be chargeable only with such moneys as they actually receive. That clause is unnecessary, unless the testatrix contemplated that the donees were trustees of the whole property given. Then follows the reimbursement clause, shewing that the testatrix contemplated that the trustees might require reimbursement of moneys expended in the execution of their trust. The trust for sale and the indemnity and reimbursement clauses hang together, and show that the testatrix was contemplating a complete trust. This excludes the notion of the trustees taking beneficially. . . .

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## VAN DER VOLGEN v. YATES.

(New York Court of Appeals, 1853, 9 N. Y. 219.)

On the 27th of April, 1790, Nicholas Van der Volgen owned a lot in Schenectady, the land out of which this controversy arose. On that day, by indenture of release reciting that the releasees were in possession of the premises "by virtue of a bargain and sale to them thereof made for one whole year, by indenture bearing date the day next before the day of the date of these presents, and by force of the statute for transferring uses into possession," and in consideration of £100 paid by the releasees, he released the premises to Robert Alexander and seven other persons named, of whom Joseph C. Yates, the original defendant in this action, was one, "and to their heirs and assigns forever." The deed then declared that the conveyance was "upon trust, nevertheless, to the only proper use, benefit and behoof of Cornelius Van Dyck" and twelve other persons named, "members of St. George's Lodge, in the town of Schenectady, and all others who at present are or hereafter may become members of the same, their survivors and successors forever, and to and for no other use, intent and purpose whatsoever." . . .

In 1797 Nicholas Van der Volgen died, leaving a will in which, not having specifically disposed of the reversion of the premises in question,

he made Lawrence and Petrus Van der Volgen his residuary devisees. In 1819 Petrus died, having devised all his estate by will to Myndert Van der Volgen; Lawrence and Myndert being thus the legal representatives of Nicholas in any devisable estate in the premises which he may have had at the time of his death.

In 1833 the act to incorporate the Utica and Schenectady Railroad Company was passed. Under its authority the company instituted proceedings to appropriate the lot in question to the use of the road. To these proceedings Lawrence and Myndert Van der Volgen, Joseph C. Yates, now the sole survivor of the releasees in the before mentioned conveyance, and certain persons claiming to be members of St. George's Lodge, were made parties, all of the *cestuis que trust* named in that instrument being dead. The commissioners awarded six cents to the two Van der Volgens, and $2755 to Yates "as trustee under the release;" and the two former filed their bill in chancery against the latter to compel the payment of the money to them as the representatives of the releasor, and entitled to the land or its proceeds. The vice-chancellor dismissed the bill, and this decree was affirmed by the chancellor (3 Barb. Ch. R., 242.) The complainants appealed to this court.

All the original parties to the action had died since the commencement of the suit, and their personal representatives were the present parties.

RUGGLES, Ch. J. In determining this case it will be assumed that the deed executed by Nicholas Van der Volgen to Robert Alexander and seven others, for the use of Cornelius Van Dyck and twelve others, was a valid conveyance by lease and release, operating by force of the statute of uses, to vest in Van Dyck and others who are specially named as *cestuis que use*, an estate for their joint lives and the life of the survivor, but not an estate in fee: and that the limitation of the further use to "all others who were then or thereafter might become members of St. George's Lodge, their survivors and successors forever," was void for uncertainty; and that the use or equitable interest thus attempted to be given to the members of the lodge not specifically named, cannot be sustained either as a legal estate by force of the statute of uses, or as an executory trust, or as a charitable use. Upon these assumptions the only remaining question is whether upon the death of the last surviving *cestui que use* the estate resulted back to the representatives of the grantor, who are the complainants. If it did so, they are entitled to the money in controversy, otherwise not.

Before the statute of uses, and while uses were subject of chancery jurisdiction exclusively, a use could not be raised by deed without a sufficient consideration; a doctrine taken from the maxim of the civil law, *ex nudo pacto non oritur actio.* In consequence of this rule the court of chancery would not compel the execution of a use, unless it had been raised for a good or valuable consideration; for that would be to enforce *donum gratuitum.* 1 Cruise, tit. xi. ch. 2, § 22.) And where a man made a feoffment to another without any consideration, equity presumed that he meant it to the use of himself; unless he expressly declared it to be to the use of another, and then nothing was presumed contrary to his own expressions. (2 B. Com., 330.) If a person had conveyed his lands to another without consideration, or declaration of uses, the grantor became entitled to the use or pernancy of the profits of the lands thus conveyed.

The doctrine was not altered by the statute of uses. Therefore it became an established principle, that where the legal seizin or possession of lands is transferred by any common law conveyance or assurance, and no use is expressly declared, nor any consideration or evidence of intent to direct the use, such use shall result back to the original owner of the estate; for where there is neither consideration nor declaration of uses, nor any circumstance to show the intention of the parties, it cannot be supposed that the estate was intended to be given away. (1 Cruise, tit. ii., ch. 4, § 20.)

But if a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. (2 Bl. Com., 330.) And if in such case no use is expressly declared, the person to whom the legal estate is conveyed, and from whom the consideration moved, will be entitled to the use. The payment of the consideration leads the use, unless it be expressly declared to some other person. The use results to the original owner where no consideration appears, because it cannot be supposed that the estate was intended to be given away; and by the same rule it will not result where a consideration has been paid, because in such case it cannot be supposed that the parties intended the land should go back to him who had been paid for it.

The statute of uses made no change in the equitable principles which previously governed resulting uses. It united the legal and equitable estates so that after the statute a conveyance of the use was a conveyance of the land; and the land will not result or revert to the origi-

nal owner except where the use would have done so before the statute was passed. (Cruise, tit. x, ch. 4, § 20.)

It is still now, as it was before the statute, "the intention of the parties to be collected from the face of the deed that gives effect to resulting uses." (1 Sanders on Uses, 104, ed. of 1830.)

As a general rule it is true that where the owner "for a pecuniary consideration conveys lands to uses, expressly declaring a part of the use, but making no disposition of the residue, so much of the use as the owner does not dispose of remains in him. (Cruise, tit. xi, ch. 4, § 21.) For example, if an estate be conveyed for valuable consideration to feoffees and their heirs to the use of them for their lives, the remainder of the use will result to the grantor. In such case the intent of the grantor to create a life estate only and to withhold the residue of the use is apparent on the face of the deed; the words of inheritance in the conveyance being effectual only for the purpose of serving the declared use. The consideration expressed in the conveyance is therefore deemed an equivalent only for the life estate. The residue of the use remains in or results to the grantor, because there was no grant of it, nor any intention to grant it, and because it has never been paid for.

But the general rule above stated is clearly inapplicable to a case in which the intention of the grantor, apparent on the face of the deed, is to dispose of the entire use, or in other words of his whole estate in the land. Such is the case now before us for determination. The consideration expressed in Van der Volgen's deed was £100; and it is perfectly clear on the face of the conveyance that he intended to part with his whole title and interest in the land. He limited the use by the terms of his deed "to Cornelius Van Dyck and twelve other members of St. George's Lodge in the town of Schenectady, and all others who at present are, or hereafter may become members of the same, their survivors and successors forever." He attempted to convey the use and beneficial interest to the members of that lodge either as a corporate body, capable of taking by succession forever, or to that association for a charitable use or perpetuity. In either case, if the conveyance had taken effect according to the grantor's intention, it would have passed his whole title, and no part of the use could have resulted to him or his representatives. Admitting that the declaration of the uses was void except as to the *cestuis que use* who were specially

named, and good as to them only for life, yet it cannot be doubted that the parties believed when the deed was executed that the grantor conveyed his whole title in fee, and the intention of the parties that the entire use and interest of the grantor should pass, is as clear as if the limitation of the whole use had been valid and effectual. This intent being established it follows, as a necessary consequence, that the sum of £100 consideration was paid and received as an equivalent for what was intended and supposed to have been conveyed, that is to say for an estate in fee. The express declaration of the use in the present case, instead of being presumptive evidence that the grantor did not intend to part with the use in fee, is conclusive evidence that he did so intend; and the extent of the express declaration is as much the measure of the consideration as if the whole of the declared use had been valid. The complainant's claim to the resulting use, or reversion of the land, being founded solely on the assumption that the grantor never was paid for it, must, therefore, fail because the assumption is disproved by the deed itself.

A use never results against the intent of the parties. "Where there is any circumstance to show the intent of the parties to have been that the use should not result, it will remain in the persons to whom the legal estate is limited." (1 Cruise, tit. xi, Use, ch. 4, § 41.) In this case there are at least two such circumstances. They have already been alluded to; first, the intent expressly declared to convey the land in fee or in perpetuity for the benefit of the members of St. George's Lodge. This effectually repels the idea of a resulting use. The two intents are incompatible. Secondly, the payment of the purchase money, of which enough has been already said.

If it be said that the express declaration is a presumptive proof that the grantor did not intend that the grantees of the legal estate should have that part of the use which was effectually declared, the answer is, that the express declaration is proof at least equally strong that he did not mean that the use should result to himself. Conceding then that the intention of the parties in regard to this residue of the use cannot be carried into effect, the equity which governs resulting uses settles the question between them. It gives the residue to the grantees because the grantor has had the money for it, and the language of the conveyance is sufficient to pass it. The grantor cannot have the purchase money and the land also. Payment of the purchase money

for the entire title, vests the entire use in the grantees, excepting only so much of it as may be effectually declared for the benefit of some other person. . . .

It has been assumed that the use expressed in favor of the members of St. George's Lodge, not specially named, was not valid as a charitable use. But it was not necessary to decide that question. The decision of this case must not be understood as settling any question as to the title to the money in controversy, except that no part of it belongs to the complainants. .

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## HAIGH v. KAYE.

(In Chancery, 1872, L. R. 7 Ch. App. 469.)

Sir W. M. James, L. J. . . . The Defendant admits that there was a conveyance given to him purporting to be executed in consideration of £850 paid by him to the original Plaintiff, G. A. Haigh, by which he became, by purchase, owner of the estate. He admits that there was no such transaction in fact as any sale to him, but that the payment of the £850 was a mere form, and that the Plaintiff paid the expenses of the conveyance to him, or gave him the money to pay them. That being so, he goes on to admit that he was to hold the estate upon trust to pay the rents and profits to the Plaintiff, and when the Plaintiff called upon him for a reconveyance he was to reconvey it. The Plaintiff has called upon him to reconvey the estate, and he suggests by way of answer to that, first of all vaguely and faintly, that this transaction was not altogether a straightforward transaction; that this transaction was entered into with a view to defraud somebody else, The Defendant says in effect, "I am to remain in possession of the estate, because we were both of us engaged in a transaction contrary to the law, and you will not take it away from me to give it to a man who was as bad as I was in the matter; in fact it was an illegal and fraudulent transaction against somebody else, and where there is an equal crime the Court ought to hold that *in pari delicto melior est conditio possidentis.*" However the Defendant has not raised that defense in the way in which according to my judgment, such a defense ought to be raised. If a Defendant means to say that he claims to hold prop-

erty given to him for an immoral purpose, in violation of all honor and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the Plaintiff, fearing an adverse decision in the suit of Haigh v. Haigh, conveyed the property to him. I think that is not sufficient.

The next objection taken was upon the Statute of Frauds. The Defendant admits that he took the estate upon the most positive agreement to return it; but in another part of his answer he sets up the Statute of Frauds, and claims the estate as a right. Now the Statute of Frauds no doubt says, that a person claiming under any declaration of trust or confidence must show that in writing; but the statute goes on to say that no resulting trust, and no trust arising from operation of law, is within that enactment. I apprehend it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in a case of a plain, clear and deliberate fraud. The words of Lord Justice Turner, in the case of Lincoln v. Wright, 4 De G. & J. 16, where he said, "The principle of this Court is that the Statute of Frauds was not made to cover frauds," express a principle upon which this Court has acted in numerous instances, where the Court has refused to allow a man to take advantage of the Statute of Frauds to keep another man's property which he has obtained through fraud. It is difficult to distinguish this case from that of Childers v. Childers, 1 De G. & J. 482. It is consistent entirely with Davies v. Otty, 35 Beav. 208, which does not seem to me to carry the matter at all further than the decision of Lord Justice Turner in Lincoln v. Wright, where the Statute of Frauds was attempted to be set up in the same way by a man who claimed to take under an absolute conveyance instead of a mortgage.

That being so, the Statute of Frauds and the ground of supposed illegality of the whole transaction being set aside, the Defendant comes into possession of this property as a trustee for the Plaintiff. Then he says that although he was made a trustee there was a talk about his becoming the purchaser. He does not pretend to say that at that time there was any bargain, but he says that it was understood, before he was called upon to reconvey the property, that if he could make an arrangement to purchase it he was to have it. . . .

I am of opinion that the Defendant has failed to prove his case, and therefore that the decree is quite right in declaring that he is to be

treated as a trustee of the property, and must reconvey it to the representative of the original Plaintiff.

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## MESCALL v. TULLY

(Supreme Court of Indiana, 1883, 91 Ind. 96.)

Elliott, J. . . . An express trust cannot be created by parol. As the appellant conveyed the land to Julia Tully by a deed absolute on its face, he can not destroy the effect of his conveyance by alleging that there was a verbal agreement that she should hold it in trust for both of them. Our cases are full upon this subject, and they are in line with the doctrine of the text-writers. Dunn v. Dunn, 82 Ind. 42; Owens v. Lewis, 46 Ind. 488 (15 Am. R. 295); Pearson v. East, 36 Ind. 27; Irwin v. Ivers, 7 Ind. 308; 1 Perry, Trusts, section 79; 1 Greenl. Cr. 356, n.; 1 Hilliard, Real Prop. 425.

The case is not one where the doctrine upon which constructive trusts are founded can have force, for here the only trust is the express one alleged to have been created by parol. Where there is an express trust there can be no implied one. There are no facts upon which the law can frame a construction of a resulting trust. It would be a plain violation of the letter and the spirit of the statute to permit a deed absolute in its terms to be turned into the conveyance of a trust by a verbal agreement. The very evil the statute was intended to prevent is the one which would prevail if an express trust could be created against an absolute conveyance by an oral agreement. The whole purpose of the statute would be defeated if a deed absolute in terms were allowed to be transformed into an instrument creating a trust for the benefit of the grantor or any one else.

There was no contract of sale, and the cases of Fisher v. Wilson, 18 Ind. 133; Wiley v. Bradley, 60 Ind. 62; Stephenson v. Arnold, 89 Ind. 426; Jarboe v. Severin, 85 Ind. 496, have not the slightest application. It would be strange indeed if a party could be permitted, in the face of our broad and explicit statute, to use an oral agreement creating an express trust for the purpose of charging the grantee with the value of the property conveyed by the deed. It would endanger all titles to hold such a doctrine. It finds no support in the cases, and has none in principle. . . .

## O'NEILL v. CAPELLE.

(Supreme Court of Missouri, 1876, 62 Mo. 202.)

SHERWOOD, J. This is a suit in the nature of a bill in equity brought by the daughter of the former owner of certain lands situate in St. Louis county, one S. H. Robbins. The object of the suit, in which the husband is joined as co-plaintiff, is to have the deed absolute, under which the defendant holds those lands, declared a mortgage and for permission to redeem, etc. . . .

The record in this cause is a voluminous one, but the matters at issue involved therein lie within a very small compass. In all proceedings like the present, the obvious and chief point for inquiry and determination is: Was the conveyance intended as a security for a debt? If this inquiry receives a reply in the affirmative, it will, in the eyes of equity, effectually and indelibly stamp the conveyance, however absolute in form, with the character, attributes and incidents of a mortgage. Ordinarily it is, perhaps necessary in order to meet the requirements of the statute of frauds, that a defeasance in writing should pass between the parties; but this is not absolutely essential in all cases, for if the grantee deny the trust, equity on proof of the trust will treat such a denial as a fraud and will consequently hold the grantee as firmly bound by his verbal agreement as though the parol defeasance were a written one fortified and hedged about with all the formal solemnity known to the law. (Sto. Eq. Jur., 231, § 1.)

Were the rule otherwise, were a deed absolute in face absolute in fact, the statute for the prevention of frauds would become a monstrous misnomer, and instead of preventing, would promote the creation of countless frauds.

And courts of equity, in enunciating the rule above stated, do but pursue the same enlightened policy in this regard as that which they invaribly pursue in respect to parol contracts for the sale and conveyance of land, parol promises by a mortgagor and vendor of land to his vendee to pay off existing incumbrances (Chapman v. Beardsley, 31 Conn, 115). and parol promises by parties exchanging lands to remove incumbrances. (Pratt v. Clark, 57 Mo. 189.)

If, however, any given transaction should turn out, upon investigation, to be a conditional sale, and it should be satisfactorily established to be a real sale and not a thin disguise whereby a loan is concealed, as a matter of course such transaction will be held valid in accordance with the intention of the parties. But courts of equity watch transactions of this sort with such jealous and ever vigilant solicitude, that if the matter be in doubt, they will resolve that doubt in favor of the theory of a mortgage, and compel the transaction to assume and wear that hue and complexion. (Sto. Eq. Jur., §§ 1018b, 1019.)

In the case at bar, not the slightest doubt can exist. The defendant denied and repudiated the trust; this paved the way for the introduction of parol testimony; and it was introduced with cogent and telling effect. The allegations of the petition were established in every essential particular; the decisive test in such cases, the existence of the debt, was proved beyond controversy. The defendant's acts, his admission before the trial, and at the trial when a witness, place the matter in the clearest possible light. In addition to that, the defendant kept an account with the property conveyed, charging M. W. Robbins, "whose name he took the liberty of using to keep a memorandum account," with sums expended in relation thereto—recorded the deed from Ghio to defendant, etc., and besides, wrote numerous letters to S. H. Robbins, admitting in terms not to be misunderstood, the attitude the defendant occupied in relation to the property. But it can serve no useful purpose to cite or quote the evidence in detail; it shall suffice to say that a plainer or stronger case never invoked equitable interposition. . . .

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## CALDWELL v. CALDWELL.

(Supreme Court of Kentucky, 1870, 70 Ky. (7 Bush) 515.)

ROBERTSON, C. J. . . . In the year 1863, Alexander Caldwell, a citizen of Campbell County, Kentucky, shortly before his death, published his last will, whereby he contemplated a proximate equality in the distribution of his estate among his six children, one of whom, James Caldwell, was then a soldier in the Confederate army. The

testator, sympathizing with that son and the cause he had espoused, indicated a desire to secure to him "the home place" of nearly three hundred acres of land, which would not have exceeded the value of the devises to each of his other five children then near him. But apprehending that James, if he should even survive the war, might by his rebellion against the Government of the United States forfeit his estate, he devised the legal title of the "home place" to his other five children, on a latent trust that if James should ever return, and be capable of holding the title, they should convey it to him. And this, according to satisfactory oral testimony, they understood and tacitly agreed to fulfill.

On his return, about the close of the war, there being no danger of forfeiture, two of those devisees, Daniel and William Caldwell, true to the trust, each conveyed to him one fifth of the land, of the whole of which he thereupon took possession with the apparent acquiescence of the other three devisees of the home tract; and this possession he appears to have retained without disturbance or complaint for more than three years, when the three recusant devisees and the husband of one of them refusing to convey their interests to him, he on the 10th of September, 1869, brought this suit against them for enforcing their obligation under a resulting trust. His petition charging the trust was denied by their answer; and on that issue the circuit court decreed a release to James of their title, and by this appeal they seek to reverse that decree.

Implied trusts being excepted from the statute of frauds and perjuries, if the facts established such a trust in this case, no written memorial of it was necessary for enforcing it, nor was the oral testimony incompetent on the alleged ground that it contradicts the will.

Extraneous testimony is incompetent to supply an unintentional omission or to contradict an expressed intention in a will. But the facts established by extrinsic evidence in this case have no such aim or effect. They are consistent with the testator's intention, and with the concession that the will is just what he intended it to be, and they supply nothing which he unintentionally omitted. He intended to pretermit his son James as an express devisee of the land, and to rely for his benefit on the plighted honor of the express devisees. Might he not have done so securely on a promise that the five devisees would pay to James ten thousand dollars? and would proof of such agree-

ment contradict the will, or supply any unintentional omission in it, without which omission his purpose of making James a co-equal beneficiary might have been frustrated by impending forfeiture?

The competency of oral testimony for establishing and enforcing such trusts as that claimed in this case is prescriptively recognized by undeviating authorities, among a great multitude of which we only cite the following: Drakeford v. Weeks, 3 Atkins, 639; Barrow v. Greenhough, 3 Vesey, 152; Strickland v. Aldridge, 9 Vesey, 519; Maislar v. Gillespie, 11 Vesey, 639; 2 Powell on Devises, 415. To these citations we might, if deemed needful, add many others in England and America, and even in this court, illustrative of the same principles.

On the like principles the most familiar case of resulting trusts is upheld. Why else, where an unqualified title to land is conveyed to one, the law has adjudged that he holds it in trust for another on oral proof that the latter paid the consideration, in the absence of any fact authorizing a countervailing presumption? In such a case there is no sale of land by the one to the other requiring writing, and the extraneous fact is admitted not to contradict the deed, but to prevent a fraud.

So here, had not the actual devisees been understood by the testator as accepting the devise in trust for James, an essentially different will would have been made, excluding their power over the land as devised; and consequently their refusal to execute the trust is a constructive fraud on the testator as well as on their brother James.

The proof of the trust is corroborated by the conduct of Daniel and William, by the testator's purpose of equality, and by the apparent recognition of it by the acquiescence in the claim and possession by James for years since his return.

We are satisfied that the will was made as it is, with the mutual understanding of the trust as claimed.

Wherefore, we conclude that the judgment of the circuit court is right, and therefore affirm it.

## PHILLIPS v. PHILLIPS.

(Supreme Court of Missouri, 1872, 50 Mo. 603.)

Bliss, J. The plaintiff seeks to quiet and have confirmed to him the title to some 9,000 acres of land which he claims were deeded to him by his father, Shapley R. Phillips, while living, but shows that the deeds were lost without being recorded. He makes the heirs of decedent parties, and also the heirs of Mrs. Phillips, now deceased, who was a second wife and not his mother, and who had elected to take a child's interest in the estate of her deceased husband. Mrs. Phillips' heirs alone seem to be defending, but I find a minor grandson of said Shapley R. among the parties, whose interest the court should protect without reference to the character of the defense made by his guardian. The whole claim, then, of the plaintiff must be treated as contested both by Mrs. Phillips' heirs, as inheriting her interest in the estate, and the plaintiff co-heirs.

It is established by the clearest evidence that Shapley R. Phillips, in February, 1861, two years previous to his death, executed to the plaintiff three deeds to the land claimed in this proceeding, and that his said wife joined in the deeds, relinquishing her dower. These conveyances embraced all the land owned by decedent except the home farm of about 1,800 acres, and the consideration expressed was love and affection and $1,000, which sum the plaintiff does not claim to have paid. . . .

The decree of the court below vests in the plaintiff the whole property contained in the three deeds to hold for his own use. The circumstances attending their execution, and the declarations of the grantor, indicate that he intended the property conveyed to be held for the use of his three children. No other reason can be given for his desire that it should be embraced in three deeds instead of one. Though that fact of itself may prove nothing, yet in connection with the circumstances surrounding their execution, it is not without significance. There is nothing whatever that indicates any design to disinherit the other children. That was not the motive that induced the conveyance, but the grantor seemed for some reason to have

a strong desire that the ownership of his lands should be settled, or that they should be disposed of before he died, reserving only the home farm. When asked why he conveyed them all to Amos, he replied that Amos would not wrong his brother and sister; or, as the magistrate testified at the trial, "When I asked him, why write these deeds, why not make one to each of his children?" he said, "Make the deeds to Amos; he will never defraud his brother and sister." Amos had just come of age, one of his other children was a daughter; her age was not given, and the other one an infant son. It is evident that, instead of dividing up his land himself, he trusted the division to his eldest son, and for reasons which, perhaps, do not appear. But enough appears to show a trust and confidence reposed in him, and that to ignore it would defraud his brother and sister."

In this proceeding we are not called upon to say whether or not this trust would be enforced at the suit of his brother and the heir of the sister. But the court will not put him who manifests a disposition to ignore his obligation in a position to be able to profit by such disposition; and even if we conceded that no obligation was shown, still a preference of one child over another is of itself so contrary to natural justice and the policy of our laws that we should not be inclined to aid such preference. The decree below gives the plaintiff an absolute title. The other heirs are made parties and are bound by it, and are so far disinherited entirely. It is true they make no defense, and the brother being now of age may trust the plaintiff if he chooses, and consent to this judgment; but the infant heir of his sister can consent to nothing, and it is the duty of the court to protect his rights. The judgment of the court should therefore be reversed and the cause remanded. If the plaintiff shall be willing to protect the rights and interest of his sister's child, we think he is entitled to relief, and the court below should give him judgment upon his making a satisfactory provision for such minor, either by an independent instrument or in the judgment; and if he declines to make such provision he should not be aided in perfecting his title. The other judges concur.

## PERRY v. STRAWBRIDGE.

(Supreme Court of Missouri, 1907, 209 Mo. 621, 108 S. W. 641.)

Graves, J. . . . This is an exceedingly interesting case. The question for determination, bluntly stated, is, Can a husband who murders his wife inherit the one-half part of her estate under section 2938, Revised Statutes, 1899? To this State it is a new question, and, with few exceptions, a new one in all the States. But few courts of last resort have been called upon to pass upon the question as to what effect the criminal act of a prospective legal heir will have upon his or her rights, under positive statutes governing descents and distributions. Of those which have passed upon it we frankly confess that the holdings of a majority thereof are against the views which we entertain and will hereafter express. We are not satisfied with the reasoning of those cases and have been unable to reach the conclusion that a mere prospective legal heir, or devisee in a will, can make certain that which was uncertain, by his own felonious act, in the cold-blooded murder of the party from whom he or she expects to inherit. We do not believe that these courts have fully applied and used the canons of statutory construction which we have the right to use and ought to use to avoid a result so repugnant to common right and common decency. The construction as has been given such statutes bruises and wounds the finer sensibilities of every man. In the case at bar, the murdered woman, younger in years, might have outlived the prospective heir. The property involved in this very suit might have been used by her for her own comforts even though she had died first. Being hers it might have been sold and the proceeds disposed of by gift or otherwise. Can it be said that one, by high-handed murder, can not only make himself an heir in fact, when he had but a mere expectancy before, but further shall enjoy the fruits of his own crime? To us this seems abhorrent to all reason, and reason is the better element of the law. . . .

In fact, the pathway of judicial literature from the earliest period down to the present is literally strewn with cases, which like beacon lights have guided the hand of justice in preventing unjust, un-

righteous, absurd, unreasonable and abhorrent results from the use of general words and expressions in statutes. To cite and quote more would be but to become tedious. We have gone thus far on account of the newness of the particular question of this case. Under these authorities we should not and will not hold, that "widower" as used in section 2938, supra, means one who has created a condition by murderous hands and heart. This case is without the statute. "Widower" as there used means one who has been reduced to that condition by the ordinary and usual vissitudes of life, and not one who, by felonious act, has himself created that condition. . . .

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## ELLERSON v. WESTCOTT.

(New York Court of Appeals, 1896, 148 N. Y. 149, 42 N. E. 540.)

The plaintiff, claiming as one of the heirs of her brother, Munroe Westcott, who died May 9, 1891, seised of several parcels of real estate, in November, 1893, commenced this action for partition. . . After issue had been joined, the plaintiff made a motion at special term to amend her complaint, which motion has given rise to this appeal. The amendment sought was to permit her to allege, in substance, that the defendant Elizabeth P. Wescott, for the purpose of realizing the benefits given her by the will, caused the death of the testator by the administration of poison or by other means. The special term denied the motion, but its order was reversed by the general term, and from the order of reversal this appeal is taken.

Isaac H. Maynard, for appellants. A. P. Wales, for respondent.

ANDREWS, C. J. (after stating the facts). The plaintiff and the defendants Elizabeth P. Westcott and Cora P. Ganung were never tenants in common or joint tenants of the real property sought to be partitioned. The plaintiff claims title as one of the heirs at law of the testator, Munroe Westcott. The record title is by the will in the defendants named and others. If the will is given full effect, the plaintiff has no title to or interest in the land. . . . If the fact stated in the proposed amendment, to the effect that the defendant Elizabeth P. Westcott caused the death of the testator by poisoning or other felonious means to enable her to come into possession of the

estate devised to her, would, if proved, make the devise to her void, the court had power to permit the amendment to be made, and the denial of the motion at special term, which was put on the want of power was erroneous. If, on the other hand, conceding that the fact sought to be introduced by amendment was true, nevertheless the devise to the testator's wife was not thereby rendered void, the issue tendered could not be tried in a partition action. The plaintiff relies upon the case of Riggs v. Palmer, 115 N. Y. 514, 22 N. E. 188, as establishing that where a legatee or devisee under a will, to prevent a revocation or to anticipate the enjoyment of the benefit conferred, puts the testator to death, the felonious act makes the legacy or devise void. We think this contention is not justified by that case. That was an action by an heir at law of a testator against a devisee and legatee who had murdered the testator to obtain the possession of the property given him by the will, to cancel the provisions for his benefit, and to have it adjudged that he was not entitled to take under the will, or to share, as distributee or otherwise, in the estate of the testator; and the relief was granted. But the court did not decide that the will was void. A will may be void for many reasons. It may not have been executed with the forms required by law. It may dispose of the property upon limitations in contravention of law. The testator may, by reason of alienage or other incapacity, be incapable of making a will. The statute may interpose a prohibition against devises or bequests to certain persons or corporations, or affix limitations; and wills made in violation of the statute will be void, either in whole or partially. Hall v. Hall, 81 N. Y. 130. A will may be procured by fraud or undue influence, and, if this is established, the will is void, because it is not in law the act of the testator.

But the case presented by the fact sought to be introduced by the amendment to the complaint in this action does not show, or tend to show, that the will was void. It alleges neither incompetency on the part of the testator, nor any defect in the execution of the will, nor that the devise to the testator's wife was in contravention of any statute, nor that it was procured by fraud or undue influence, nor that the wife was under any incapacity to take and hold property by will. If the fact sought to be incorporated in the complaint can be established, Riggs v. Palmer is an authority that a court of equity will intervene, and deprive her of the benefit of the devise. It will defeat the fraud

by staying her hand and enjoining her from claiming under the will. But the devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court, in a proper action, will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property. The civil law debarred one who procured the death of another from succeeding to his estate, either as testamentary heir or by inheritance, on the ground that he was unworthy. Domat says he shall be deprived to the inheritance (part 2, bk. 1, tit. 1, sec. 3), and in the Code Napoleon (section 627) such a person is classed among those "unworthy to succeed, and as such excluded from succession." This was one of the penalties for his misconduct. It operated to exclude him from the benefit of the devise on the principle that by his conduct he had debarred himself from claiming it. . . .

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## TENNISON v. TENNISON.

(Supreme Court of Missouri, 1870, 46 Mo. 77.)

Currier, J. . . . The petition shows in brief that the plaintiff intermarried with the defendant, Archibald Tennison, many years ago, and that they have ever since lived together as husband and wife, and are still so living together in that relation; that the plaintiff, subsequently to such intermarriage, derived from her father and his estate a considerable amount of money and property; that it was mutually arranged and agreed upon between herself and husband that he should take a certain portion of such property as his own absolute estate, the plaintiff waiving her right to a settlement of any portion of it upon herself, and that he did so receive and appropriate to his own use his agreed proportion of said property; that her husband, in consideration thereof, agreed to invest certain other moneys, together with certain land warrants acquired by the plaintiff from her father and his said estate, in lands to the sole and separate use

of the plaintiff and in her name; that her husband, in consideration and in pursuance of the premises, did in fact apply, use, and invest such moneys and land warrants in the purchase and acquisition of the lands described in the petition, taking a deed thereof in his own name; the plaintiff supposing and believing, however, that the lands were conveyed directly to herself for her separate use. The petition further shows that the plaintiff's husband and the other defendants entered into a fraudulent combination and conspiracy to cozen and cheat the plaintiff out of her equitable right, title, and interest in said lands; and that her husband, in pursuance of such fraudulent conspiracy, conveyed said lands to the other defendants voluntarily and without consideration, and with a view fraudulently to cut off and defeat the plaintiff's equitable rights, the grantees therein being parties to the alleged fraud. The petition also shows that two of said grantees have purchased and acquired the interest of one of the other grantees, taking such interest, however, with a full knowledge of the alleged fraud.

Such is the substance of the petition, and the question is raised whether the post-nuptial agreement therein stated, and the other connected facts therein alleged, are of a character to warrant the granting of the relief sought.

The theory of the common law that husband and wife, for legal purposes, constituted but one personality, and that they are consequently incompetent to contract with each other, has but a limited and quite restricted application in equity. For many purposes courts of equity treat them as separate and independent persons, and fully recognize their authority and capacity to make valid and binding contracts between themselves, and to have separate and independent estates, rights, interests and liabilities. A contract between husband and wife will be held good in equity, as a general rule, when it would be valid and binding at law if made with the trustees of the wife for her benefit. In equity, the intervention of trustees is not an indispensable prerequisite to the validity of the contract. (Sto. Eq. Jur., §§ 1368, 1372-4; Barron v. Barron, 24 Verm. 375; Wallingsford v. Allen, 10 Pet. 583; Kenny v. Kenny, 5 Johns, Ch. 463; Resor v. Resor, 9 Ind. 347.)

If the contract set out in the petition had been made between Archibald Tennison acting in his own behalf, and trustees appointed

for that purpose acting in behalf of his wife, the validity of the contract would hardly be questioned either in law or equity. . . .

It is objected, however, in the case at bar, that Tennison, the husband, had reduced the money and property which were employed in the acquisition of the disputed premises, to possession; and it is thence argued that such money and property thereby became his, and that he was consequently at liberty to use and dispose of it as he pleased and without accountability to his wife. The conclusion may be a legitimate one at law, but it is not so in equity, as we have already, perhaps, sufficiently seen. In equity, the mere reception of the property by the husband is not such a reducing of it to possession by him as to defeat the equitable rights of the wife, unless the husband received it solely in the exercise of his marital rights and for the purpose of appropriating it to his own use. (See the several authorities already cited).

In the case before us the petition abundantly shows that the husband did not receive the money and warrants for the purpose of appropriating them to his own use, but expressly and by positive agreement for the benefit of his wife, and to be appropriated to her sole and separate use. He made the contemplated purchase in his own name, and equity will treat him as holding the title as trustee for his wife. The other defendants acquiring their interest without consideration, and as the result of a conspiracy to which they were parties to defraud Mrs. Tennison out of her equitable rights, stand in no better position. . . .

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## NEBRASKA NATIONAL BANK v. JOHNSON.

(Supreme Court of Nekraska, 1897, 51 Neb. 546, 71 N. W. 294.)

Post, C. J. This was an action in the district court for Douglas county, whereby it was sought to impress with a trust in favor of the plaintiff, the Nebraska National Bank, certain property, to wit, lots 3 and 4 of block 3, Willis Park Place Addition to the city of Omaha, the legal title of which was held by the defendant, Brooks R. Johnson. The cause of action alleged is, in substance, that the defendant above named was, during the month of August, 1890, and

for a long time prior thereto, in the employ of the plaintiff bank, his duties being, for a fixed compensation, to sweep the bank's offices, to arrange and care for the furniture therein, and, while in the discharge of his said duties, to watch over, guard, and preserve, to the extent of his ability, all property of the bank, including moneys, notes, and papers; that the said defendant, on the 13th day of August, 1890, while in the discharge of his said duties, and in violation of the trust imposed in him by the plaintiff, wrongfully took, carried away, and appropriated to his own use the sum of $5,000 in gold coin, the property of the said plaintiff; that the said defendant thereafter purchased and improved the property above described with plaintiff's said money so wrongfully taken and converted by him, and that said property is now and has for a long time been occupied and claimed as a homestead by the said defendant and his wife, Ellen Johnson. It was further charged that the said Brooks R. Johnson is wholly insolvent, having no property whatever aside from the real estate here in controversy. The prayer was that the defendants might be adjudged to hold said property in trust for the plaintiff, for a decree confirming the title of the latter, and for general relief. . . .

The other questions discussed are (1) whether the relation of the parties toward each other was a fiduciary one in the sense in which that term is understood and employed by courts of equity; (2) whether, assuming, as claimed, that the evidence fails to establish any such relation of trust and confidence, will equity interfere for the purpose of declaring in favor of the injured party a trust with respect to property purchased by a thief with the fruits of his larceny. The propositions implied from the foregoing inquiries, although separately treated by counsel for defendants, are in fact so nearly akin that they may with propriety be discussed together. It has been held that no trust results in favor of the owner with respect to the proceeds of property stolen by a mere servant, and that the master is in such case restricted in his remedy to an action for damage, and to a prosecution of the thief in a court of criminal jurisdiction. A review of the cases tending to support that view will not be attempted in this connection. It is sufficient that the doctrine therein asserted is, in our judgment, indefensible on authority and opposed to the enlightened policy of modern equity jurisprudence. The doctrine of constructive trusts as developed by courts of equity was intended primarily as a remedy for

fraud in cases where the established rules had proved wholly inadequate, and larceny under the circumstances here disclosed is none the less a fraud upon the owner of the property stolen because committed by a servant instead of one who is, in the technical sense of the term, a trustee. Speaking on that subject, it is said in a recent valuable work: "The subject of constructive trusts is intimately connected with that of frauds; indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a constructive trust is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching." . . .

In Newton v. Porter, 5 Lans. (N. Y.), 416, which was an action in equity to compel the defendants to account for the proceeds of certain stolen bonds acquired by them with notice of the plaintiff's rights, Miller, P. J., said in reversing the decree below dismissing the complaint; "No exception is made in favor of a person who occupies no fiduciary relation to another, and the elementary books generally do not notice any exception from the rule where the money or property has been obtained by means of a felony. It would certainly be an anomaly in the history of legal proceedings, and a grave reflection upon the administration of justice, if a felon could invest the fruits of his crime, or dispose of them in such manner as to place them beyond the reach of the law." In the same case Balcom, J., after a review of the authorities, said: "The court should not refuse to allow a party to recover the avails of property stolen from him on any technical grounds when the merits of the case clearly require that he should recover, and the court should jump all technicalities and be as astute in discovering a remedy for upholding the rights of such a party as the thief is in contriving ways and means to cheat him out of his property, and the avails of it, by changing the same from one kind to another and placing it in the hands of third persons." And the court of appeals, in affirming the judgment of the supreme court, use language equally emphatic as that above quoted. (Newton v. Porter, 69 N. Y., 133.) It will be observed from an examination of the cases cited in support of the opposing view that they depend, with few exceptions, upon Pascoag Bank v. Hunt, 3 Edw. Ch. (N. Y.), 583, but which, as remarked by Irvine, C., in Tecumseh National Bank v. Russell, 50 Neb., 281, "is directly contrary to the ruling of the same vice chancellor in Bank of America v. Pollock, 4 Edw. Ch. (N. Y.), 215,

and . . . opposed to the well settled principles governing similar cases." . . .

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## WOODHOUSE v. CRANDALL.

(Supreme Court of Illinois, 1902, 197 Ill. 104, 64 N. E. 292.)

CARTWRIGHT, J. . . . The material question in the case therefore, is, whether the trust fund deposited by Furlong can be traced and identified, and upon that question the law is well settled that it is not necessary the money or bank bills should be identified. The suit is not to recover a specific thing, such as particular pieces of money or bills, but a certain sum of money held in trust, and it is the identity of the fund, and not the identity of the money or currency, which is to be established. In the early case of School Trustees v. Kirwin, 25 Ill. 62, the court said (p. 65): "It is not necessary, if the trust be moneys, that the particular coin or kind of money or the individual pieces shall be identified in order to pursue it, but its identity as a fund must be preserved so that it can be distinguished from all other money. So long as it can be followed as a separate and independent fund, distinguishable from any other fund, it can be pursued." The court held that appellants would be entitled to an enlarged decree in their behalf if the facts established the identity of the fund, but they did not. Again, in Kirby v. Wilson, 98 Ill. 240, the court, in passing on instructions, said (p 247): "If these instructions conveyed to the jury the idea that no recovery could be had unless the identical bills received by Alexander for the cattle came into the hands of the executor, then they were erroneous." It makes no difference, then, in tracing this fund, that the original package of bills was not preserved, but the question is whether the trust fund can be followed and found.

Again, it makes no difference on the question of identity that the fund was mingled with other moneys of the bank. That question was also settled in Kirby v. Wilson, *supra* where it was held that the identity of the fund is not destroyed and lost merely by being mingled with other moneys of the trustee. In that case, Alexander sold cattle and received the proceeds in trust to pay the same over to the Wilsons. He died, and had on his person at the time, $20,500, part of which

(something over $10,000) was obtained on the sale of the Wilson cattle and the balance from the sale of other cattle in which the Wilsons were not interested. All this money the widow after his death, deposited in the bank in her name, and after the executor qualified she gave him a check for the whole amount which she so received and placed in the bank. The court stated the claim on behalf of appellants as follows (p. 245): "The argument is, that plaintiffs, to recover in this case, must prove that Alexander sold the Wilson cattle and retained the identical money received from the sale of the cattle, separate and unmixed with other funds, and that such money, unmixed, passed into the hands of the defendant after the death of Alexander, but if the money was mixed with other funds by Alexander before he returned home, or was commingled with other money by his wife after his death, no recovery can be had by the plaintiffs." The court held that the portion of the proceeds received for the cattle of the Wilsons could be traced and identified as their particular property and might be followed into the hands of the executor, and that they had a preferential claim thereto over general creditors. The court said, if Alexander had disposed of the money in his life-time the case would have been different, but as he retained it and his executor took it, the Wilsons were justly and equitably entitled to a perference. It was decided in In re Hallett's Estate, 13 L. R. Ch. D. 696, that money held in a fiduciary capacity by one who places it in a bank can be recovered from the bank, although mixed with the depositor's own money; that the person for whom he held the money can follow it and has a charge on the balance in the banker's hands, notwithstanding the mingling of the funds. The presumption in such a case is, that the money drawn out by the depositor is his own, even if the trust money and his own are in one account, rather than that he had disregarded his trust and violated his duty. . . .

In this case the money was received March 15, 1893, and the failure was in the following June, and the evidence supported by the legal presumption establishes the identity of the fund and shows what became of it. If it had been shown that the trust fund was withdrawn or actually dissipated, so that none of it remained in the bank, the rule would necessarily be different. If the fund has once been disposed of, no charge can be made against the general estate in the hands of the assignee to the exclusion of other creditors, but, as we have seen, the fact that the same bills were not retained or that the fund is traced

into a larger sum of money in the same bank does not destroy its identity. Equity lays a charge, in such a case, on the fund into which the trust money is traced, and not on the general estate of the trustee. The only question here is what is a sufficient identification, and the rule is, that if it can be shown the money is in a specified place, equity will take out of that place enough money to satisfy the trust. In this case, we think that the trust fund was traced and identified by legitimate evidence and rules of law for ascertaining its identity.

The decree of the superior court of Cook county and the judgment of the Appellate Court are reversed, and the cause is remanded to the superior court, with directions to order the payment by the receiver to the petitioners of the amount of $1152.66 cash remaining in the bank and received by him when he took possession.

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## RICHARDSON v. NEW ORLEANS DEBENTURE REDEMPTION CO.

(United States Circuit Court of Appeals, 1900, 102 Fed. 780.)

SHELBY, C. J. The bill in this case was filed by the New Orleans Debenture Redemption Company, Limited, against F. L. Richardson, as receiver of the American National Bank, to collect $1,658.60 which the company had deposited in the bank. . . . The company bases its right to recover the money on the alleged fact that the bank had received it as a deposit when it was hoplessly insolvent, and under such circumstances as to make the receipt of it a fraud. . . .

Ordinarily, when funds are deposited in a bank, the relation of debtor and creditor immediately arises between the banker and the depositor. The money deposited becomes the property of the banker. He has the right to use it, but must pay the debt to the depositor by cashing his checks. When the banker obtained the deposit by committing a fraud, as by receiving it after hopeless insolvency, the relation between the parties is very different. The fraud avoids the implied contract between the parties that would arise in its absence, and having barred contract, a trust is the equitable result. The fraud itself gives no lien. The fraud prevents the money deposited from becoming the property of the banker, and therefore prevents the relation

of debtor and creditor arising between the parties. As the money does not become the property of the banker it, of course, remains the property of the depositor. In the banker's hands, therefore, it is a trust fund,—as much so as if it had been a special deposit. The money which the banker has received in due course of honorable business before insolvency has become his property, and he the debtor of those who deposited it. Now, if the banker, having money in his hands, fraudulently receives other money, and mingles it with the moneys on hand, can the defrauded depositor reclaim his money? That is the question presented by this case. The bank received $1,658.60 of the appellee's money just before it closed. It was received under circumstances of fraud so that it remained the property of the appellee. It passed with the other funds to the hands of the receiver; or, if the identical money did not pass to the receiver, the sum turned over to the receiver was increased exactly $1,658.60 by the appellee's deposit. This is clear because if, after receiving the appellee's deposit and placing it with the general funds, payments were made out of the mass of money during the business of the day, it is immaterial whether the the identical dollars deposited by the appellee were paid out or not. The amount that went into the hands of the receiver was, by the deposit of the appellee, increased to the amount of the deposit made by it. If we find that the transaction between the appellee and the bank created a trust or lien on the funds of the bank with which the appellee's deposit was mingled, the trust or lien extended to the whole mass of money, and the paying out of part of it would not remove the charge from the remainder. The question, then, is reduced to this. If a banker takes $1,000 not his own, and mixes the sum with $10,000 of his own money, can the owner of the $1,000 reclaim it? Has he, in equity, a charge on the whole to the amount of his money which has gone into it? Formerly, it was held that he had not. The equitable right of following misapplied money, it was said, depended on identifying it, the equity attaching to the very property misapplied. Money, it was said, had no earmarks, and the tracing of the fund would fail. This view was manifestly inequitable and unjust, and so, finally, it was held that confusion by commingling does not destroy the equity, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion of the fund a priority of right over the other creditors of the possessor and wrongdoer. . . .

Sir George Jessel, master of the rolls, in the case of Knatchbull v. Hallett, 13 Ch. Div. 696, 707, reviewed the English cases on this subject. He shows the struggle of the able judges of the law courts over the earmarking of money, and that finally Lord Ellenborough throws over the doctrine as to money not earmarked not being followed. We cannot take space to cite and quote the many case commented on by the master of the rolls. The opinion is marked by a keen sense of equity and strong common sense. On the direct point in question here he says:

"I have only to advert to one other point, and that is this: Supposing, instead of being invested in the purchase of land or goods, the moneys were simply mixed with other moneys of the trustee,—using the term again in its full sense, as including every person in a fiduciary relation. Does it make any difference according to the modern doctrine of equity? I say, none. It would be very remarkable if it were to do so. Supposing the trust money was 1,000 sovereigns, and the trustee put them into a bag, and by mistake, or accident, or otherwise, dropped a sovereign of his own into the bag. Could anybody suppose that a judge in equity would find any difficulty in saying that the cestui que trust has a right to take 1,000 sovereigns out of that bag? I do not like to call it a charge of 1,000 sovereigns on the 1,001 sovereigns, but that is the effect of it. I have no doubt of it." . . .

There should be no question about this doctrine on principle. If one's money is invested in land, the title being taken in another's name, equity creates a resulting trust in the land as against the wrongdoer. If an agent, bailee, or trustee invests another's money in personal property, a trust results. If one's money is lent, and a note or bond taken, the owner of the money can have a lien or trust declared on the note or bond to secure his money so used. Numerous cases show that money can be traced into other assets, notes, bonds, and stocks. There is no good reason for not applying the same doctrine to money, the measure and representative of all property. If one's money is used with other money in buying a bond, equity can fasten a lien on the bond, and sell it to reimburse the one whose money has been so used. So, we think, if one's money is wrongfully mingled with a mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution. The decree of the circuit court is affirmed.

## BOHLE v. HASSELBROCH.

(New Jersey Court of Chancery, 1901, 64 N. J. Eq. 334, 51 Atl. 508.)

DIXON, J. . . . It is clear that Mrs. Hasselbroch committed a breach of the trust, when she used the trust funds in buying real estate, and took the title to herself without providing any bond and mortgage as a first lien in favor of the trust estate, as directed by the will of her deceased husband, and the question is, what equitable situation was thereby created.

Several settled doctrines of courts of equity are pertinent to this inquiry.

It is a fundamental principle in regard to trust estates that the trustee shall derive to himself no gain, benefit or advantage by the use of the trust funds; whatever of profit may be made shall belong to and become parcel of the trust estate. McKnight's Executor v. Walsh, 9 C. E. Gr. 498. An outgrowth of this principle is that, as between *cestui que trust* and trustee and all persons claiming under the trustee otherwise than by purchase for valuable consideration without notice, all property belonging to the trust, however much it may be changed or altered in its nature or character, continues to be subject to or affected by the trust. Pennell v. Deffell, 4 De. G. M. & G. 372, 388. As a concomitant of the rule just stated, and to effecutate fully the fundamental principle, another rule exists, that, when the trustee has improperly changed the form of the estate, the *cestui que trust* may elect whether they will accept the estate in its new form or will hold the trustee responsible for it in its original condition. Ferris v. Van Vechten, 73 N. Y. 113. If the improper conversion turns out to be advantageous, they may adopt it and take the profit; if it results in loss, they may insist on having an equivalent for the estate as it was before the change; and when the *cestuis que trust* are infants, the court will deal with the matter as it shall consider best for their interest. Holcomb v. Executor of Holcomb, 3 Stock. 281. This right of election by the *cestuis que trust* is upheld by courts of equity in many cases where there has been misconduct on the part of the trustee, as may be seen by reference to Fox v. Mackreth, 1 Lead. Cas. Eq. 115, and has been fully approved by this court. Mulford v. Bowen, 1

Stock, 797; Stewart v. Lehigh Valley Railroad Co., 9 Vr. 505. It is enforced in cases like the present, for if a trustee purchases property with trust funds in his hands, and takes title in his own name and for his own benefit, he will, at the option of the *cestuis que trust,* be declared to hold it in trust for them. Durling v. Hammar, 5 C. E. Gr. 220; Story Eq. Jur. 1260, 1262. And if, in such a purchase, he has mixed up moneys of his own with the trust funds, a trust will still result to the *cestuis que trust* at their option; and the burden will be on the trustee to show the amount of his own funds used in the purchase, and so far as he fails to make that distinction the court holds the property bound by the trust. Russell v. Jackson, 10 Hare 204, 213; In re Pumfrey, L. R. 22 Ch. Div. 255; Perry, Trusts, § 128; 2 Pom. Eq. Jur. § 1076 (2).

In accordance with these doctrines we think that the complainants, when their right to the possession of the trust estate matured by the death of their mother, were entitled, upon showing that the trust funds had formed a considerable part of the purchase-money by which their mother had acquired title to the Hoboken lots, to elect whether they would claim a lien upon the lots for the amount of trust funds used in the purchase, or would claim the lots, subject to be charged, in favor of the personal representative s of their mother, with so much of the purchase-money as consisted of her own funds, and that, in endeavoring to ascertain how much was trust money and how much was the trustee's own, every reasonable intendment should be made against the trustee through whose fault the truth had become obscure.

Since the complainants, being in possession of the lots, have filed their bill in equity to have it decreed that by their trustee's purchase they became owners of the fee in remainder after their mother's life estate, they have thereby elected to take the real estate in lieu of the trust money invested therein, and to hold it charged only with their mother's own money so invested. . . .

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## PIKES PEAK CO. v. PFUNTNER.

(Supreme Court of Michigan, 1909, 158 Mich. 412, 123 N. W. 19.)

The defendant Beller on November 1, 1901, leased to one Ingersoll a parcel of land situated near the Belle Isle bridge in the city of De-

triot for 10 years at an annual rental of $1.500. The lease was assigned to the Detroit Amusement Company. That company constructed a roller coaster and other amusement appliances, and operated them until September, 1906, when the roller coaster was destroyed by fire. The sole property of the company were the lease and the amusement appliances on the land. Defendant Pfuntner was a large stockholder, and from 1904 to October 15, 1906, was its general manager, secretary, and treasurer, a member of its board of directors, and a member of the executive committee, which was composed of three of the directors. . . .

On the 8th day of October, 1906, while Pfuntner was an officer and manager of the company, as above stated, he obtained from Mr. Beller a lease of the premises for five years from November 1, 1911; that being the time at which the first lease would expire.. Pfuntner did not state to his employer or any of its officers his intention to lease the property at the expiration of the lease then in existence, and none of them were aware of his purpose. On the contrary, he intentionally concealed it from them. After obtaining this lease, Pfuntner sold out all his stock in the company. Upon learning that Pfuntner had obtained this lease, the directors held a meeting and passed a resolution reciting that Pfuntner had obtained a lease, declaring that he was at the time an agent of the company and acted in it behalf, and—

"Now, therefore, be it resolved that the Detroit Amusement Company declares that the said Charles H. Pfuntner, in the procuring of said lease, was the agent of this company, and acted in behalf of this company; that this company hereby ratifies and confirms the actions of its said agent, Charles H. Pfuntner, in obtaining a lease of said premises, and elects to treat the said lease so obtained as the property of the Detroit Amusement Company, to the same extent as though the name of the Detroit Amusement Company were contained in said lease as lessee.

"And be it further resolved that a copy of this resolution be served upon Jacob Beller and Charles H. Pfuntner."

The complainant then filed this bill, praying that said lease be held to be the property of the complainant, as assignee of the Detriot Amusement Company, to the same extent as though named in the lease as lessee, and that the defendant be decreed to hold his lease as trustee for the company. The case was heard upon pleadings and proofs taken in open court, and decree entered for complainant. The decree also required complainant to give bond in the sum of $10,000 to Pfuntner as a guaranty against liability to Mr. Beller.

GRANT, J. (after stating the facts). The principles of law controlling this case are too well settled, both by authority and reason, to require much discussion. One occupying a confidential and fiduciary relation to another is held to the utmost fairness and honesty in dealing with the party to whom he stands in that relation. Torrey v. Cement Co., *ante*, 348 (122 N. W. 614).

While it is true the tenant, in the absence of express agreement, has no enforceable right to renewal of the lease, yet it is natural that, other things being equal, the landlord would lease to his present tenant, and that the tenant would prefer to renew the lease. The expectancy is recognized by the law as a valuable asset belonging to the tenant. The law does not permit an agent, officer, or trusted employee to take it from the tenant to whom he owes the duty to protect and advance his interest. Robinson v. Jewett, 116 N. Y. 40 (22 N. E. 224), and the many cases cited; Grumley v. Webb, 44 Mo. 444 (100 Am. Dec. 304); Keech v. Sanford, 1 White & T. Lead. Cas. 62 Note; Davis v. Hamlin, 108 Ill. 39 (48 Am. Rep. 541).

This is because of the wholesome rule that—

"Whenever one person is placed in such relation to another, by the act or consent of that other, or the act of a third person, or of the law, that he becomes interested for him or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated. Keech v. Sanford, *supra*. Except with the full knowledge and consent of his principal, an agent authorized to buy for his principal cannot buy of himself. An agent authorized to sell cannot sell to himself. An agent authorized to buy or sell for his principal cannot buy or sell for himself; nor can an agent take advantage of the knowledge acquired of his principal's business to make profit for himself at his principal's expense. The same rule applies to leases and other similar transactions." Mechem's Outlines of Agency, § 148. . . .

It is no defense for defendant Pfuntner that the company for which he was acting was involved in financial difficulties and was adjudicated a bankrupt. This expectancy belonged, not only to the tenant, but to those to whom the lease might be assigned. The original lessee and his assignees have continued to pay the rent, and the complainant, as we infer from the record, has rebuilt the structure at considerable expense. Pfuntner did not obtain this lease with the knowledge or consent of the party for which he was agent, manager, and a director. It follows that he holds the lease in trust for complainant.

The decree is affirmed, with costs.

## FRAZIER v. JEAKINS.

(Supreme Court of Kansas, 1902, 64 Kan. 615, 68 Pac. 24.)

DOSTER, C. J. . . . The sole question in the case relates to the validity of the guardian's sale and deed of the land of her ward to her husband, made, as before stated, upon fair consideration, and free from actual fraud. Are they valid? If not, are they of the class denominated "void," and, therefore, subject to collateral attack? Our judgment is that they are void, and their nullity being known to Frazier, the purchaser, no title passed to him, and, therefore, the collateral action will lie.

Nothing in the law of fiduciary trusts is better settled than that the trustee shall not be allowed to advantage himself in dealings with the trust estate. He shall not be allowed to serve himself under the pretense of serving his *cestui que trust*. The most usual way in which evasions of this salutary rule are attempted is in purchases of the trust estate by, or in the interest of, the trustee. That such purchases shall not be allowed the realization of their purpose is the universal holding of the courts, and a citation to the multitudinous decisions would encumber an opinion more than it would elucidate the rule. A large number of the cases are collected in the notes to Tyler v. Herring, 19 Am. St. Rep. 263 (67 Miss. 169, 6 South. 840); Tyler v. Sanborn, 15 Am. St. Rep. 97 (128 Ill. 136, 21 N. E. 193, 4 L. R. A. 218); Wilson v. Brookshire, 9 L. R. A. 792 (126 Ind. 497, 25 N. E. 131); and this court, in Webb v. Branner, 59 Kan. 190, 52 Pac. 429, recently added another to the list. Nor, in such cases, does the fact that the sale and purchase were *bona fide* and upon full consideration avail to constitute an exception to the rule. That was distinctly so declared in Webb v. Branner, supra, in which it was said:

"It was shown that a fair price was obtained for the lot, but there being a manifest conflict between the duties of the trustee and his personal interests, the courts, for the purpose of removing all opportunity for fraud, generally hold such transfers to be void, whether they appear to be fair or not."

The above-quoted remarks imply that there may be, perhaps, exceptions to the rule, but we know of none. In fact, the main rule that

a trustee may not profit himself out of the trust estate is no better settled than the subsidiary one that lack of fraud in the trustee's dealings will not validate the transaction. The fiduciary relation of trustee and *cestui que trust* is one which does not call so much for rules to redress accomplished wrong as for rules to prevent its accomplishment. The one in question, therefore, is not intended to be merely remedial of wrong actually committed, but, rather, to be preventive, or deterrent, in effect. The opportunities which are open to an unfaithful trustee to advantage himself out of the trust estate are so many and so tempting, and the condition of the beneficiary in the trust ordinarily so helpless and confiding, that the law gives warning in advance against all transactions out of which it is possible for the former to make gain at the expense of the latter. Hence, as was tersely and wisely said by Chief Justice Beasley, in Staats v. Bergen, 17 N. J. Eq. 554: "So jealous is the law upon this point, that a trustee may not put himself in a position in which to be honest must be a strain on him."

Do the foregoing considerations apply to a sale by a guardian of the ward's land to the guardian's husband or wife, as the case may be? We have no hesitation in affirming that they do. It is true that the common-law fiction of the legal identity of the husband and wife and the very nearly complete merger of the latter in the former does not now have recognition. In this state, as allowed by statute, the wife may contract with her husband. They may own separate estates free from any present claim of interest by one in the property of the other—that is, as against the other; but it is not true that, as to their respective possessions, they are srangers in such sense as to take a trustee's sale by one to the other from out the operation of the rule in question. Upon the death of either of them, one-half of his or her property descends, under the statute, to the survivor, and under the statute neither one, without the other's consent, can, by will, devise more than one-half of his or her property. It is true the interest of one in the property of the other is contingent and uncertain, and dependent upon survivorship. It is true that the interest of the one in the land of the other is not of the character of any of the estates known to the common law, but it nevertheless possesses the elements of property. This was distinctly so ruled in Busenbark v. Busenbark, 33 Kan. 572, 7 Pac. 254; and, on the strength of the quality of property attaching to the inchoate interest of a wife in her husband's land, she

was allowed in that case to maintain an action to prevent its fraudulent alienation.

However, over and beyond that property interest which husband and wife have in each other's estate, and which possesses the element of pecuniary value, there is a larger consideration. It was well expressed by counsel for defendant in error, who said:

"The affection existing between husband and wife, the marital relation which in a sense makes them one, the implicit confidence which each must have in the other, their natural desire for each other's material prosperity, the relation which enables one to derive and enjoy personal comfort and pleasure from the property of the other, independent of the question of direct or indirect ownership in such property, are all so well recognized in law and understood by all civilized people, that it would be arguing against the experience of centuries to contend that one would not be interested in the welfare of the other, and do all that could be done to enhance the pecuniary interests of the other; therefore, by reason of the relation, no guardian could be impartial in the sale to husband or wife of the property of the ward." . . .

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## SCHOLLE v. SCHOLLE.

(New York Court of Appeals, 1886, 101 N. Y. 167, 4 N. E. 334.)

EARL, J. . . . The general rule is not disputed that the purchase by a trustee directly or indirectly of any part of a trust estate which he is empowered to sell, as trustee, whether at public auction or private sale is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action cannot buy, and is not intended to determine equities between the parties to the action, or between such parties and others. (Fulton v. Whitney, 66 N. Y. 548; Torrey v. Bank of Orleans, 9 Paige, 649; Conger v. Ring, 11 Barb. 356.) But where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested,

is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (De Caters v. Chaumont, 3 Paige, 178.) . . . Here, upon notice to all the beneficiaries, an order was made allowing these appellants to bid. After they had made their bids and signed the terms of sale, a further hearing was had upon notice to all the parties as to the fairness of the sales and the adequacy of the prices, and the sales were approved and confirmed by the court. Under such circumstances there can be no doubt that these appellants would get a good and perfect title to the lands purchased by them, and their title would be good, not only as against all the living parties to the suit, but as against unborn grandchildren, if any such should hereafter come into being.

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## FISCHLI v. DUMARESLY.

(Kentucky Court of Appeals, 1820, 3 A. K. Marsh, 23.)

Boyle, C. J. This was a bill filed by Dumaresly against Fischli, to obtain a conveyance of a moiety of four lots in the town of Louisville. He alleges that he and Fischli agreed to jointly purchase the lots, and that Fischli was to advance the whole of the purchase money, and to receive from him interest for his half thereof, until it was repaid. That Fischli accordingly made the purchase of the lots; but instead of taking the conveyance to them jointly, took it to himself, only, and refuses to convey to Dumaresly a moiety of the lots, notwithstanding he has offered to repay one half of the purchase money, with interest. He, therefore, prays that Fischli may be decreed to convey, etc.

Fischli, in his answer, denies that he made the purchase for the joint benefit of Dumaresly and himself. He admits that, at the inception of the negotiation, he conceived the idea of making such a purchase, but alleges that for reasons, which he states in his answer, and to which Dumaresly assented, he declined making a joint purchase, and contracted in his own name, and for his own benefit; and he pleads and relies upon the statute against frauds and perjuries.

The court below decreed Fischli to convey a moiety of the lots, and Dumaresly to repay to Fischli one half of the purchase money, with interest; and to that decree, Fischli prosecutes this writ of error.

It is evident that the decree cannot be sustained. The parol testimony in the cause strongly conduces, indeed, to prove the agreement alleged in the bill; but that agreement was never reduced to writing; and a mere verbal or unwritten contract for lands is remediless, according to the express provisions of the statute against frauds and perjuries.

There may, no doubt, be an equity resulting from facts, or the relation of the parties, which, notwithstanding the statute, may be enforced: for it is only to express contracts that the provisions of the statute apply. As, for example, where the conveyance of land is taken in the name of one, and the purchase money appears to have been paid by another, there will a trust result, by implication, to the latter, which is not within the influence of the statute. But in this case, there is no fact from which a trust can result to Dumaresly. The whole purchase money is admitted to have been paid by Fischli; and if Dumaresly has any equity, it must arise exclusively from the express contract of the parties, which not being in writing, cannot be enforced, according to the provisions of the statute.

The idea suggested in the argument, that Fischli acted as the agent of Dumaresly in making the purchase to the extent of a moiety of the lots, and that the statute does not require the authority of an agent to be in writing, cannot take the case out of the influence of the statute. The sufficiency of the authority of Fischli to have made a joint purchase in Dumaresly's name and his own, is not called in question. He has not done so, but has made the purchase in his own name; and whether he had an authority to make a purchase for the joint benefit of both, or not, is immaterial, if the agreement that he would do so cannot be enforced, because it was not reduced to writing. . . .

## SECTION V. TRANSFER OF TRUST PROPERTY

### SMITH v. ALLEN.

(Supreme Court of Massachusetts, 1862, 87 Mass. (5 Allen) 457.)

Merrick, J. The plaintiffs are the surviving partners of the late firm of Smith, Lougee & Co., of San Francisco. The estate of which they seek to recover possession by judgment in this suit against the

defendant, was purchased by Paige, the deceased partner, and was paid for by him with money which he secretly and fraudulently abtracted from the funds of the company. The company is now insolvent, and the plaintiffs claim to have a right to recover possession of the demanded premises, that they may apply the avails of the estate towards the payment to their creditors of the several sums due to them. . . .

The estate thus purchased and paid for by Paige with the money of the company was conveyed by him to the defendant. This bill, therefore, can be maintained against her to recover the possession of it, unless she was a purchaser thereof in good faith, without notice of the fraudulent misconduct of Paige, and for a valuable consideration. But if she was such a purchaser, then she acquired a superior title to the estate, which, having become absolutely vested in her by the conveyance, could not afterwards be defeated by the creditors of her grantor, 2 Story on Eq. § 1258, 1 Ib. 108, 381.

It is immaterial at what time the consideration was paid or passed, if it passed before she had any notice of the fraud, and before any claim of title was set up or asserted against her by the surviving partners, or by the creditors of the company. For it is a well settled principle that a deed which is voluntary or fraudulent in its creation, and voidable by creditors or subsequent purchasers, may become good and indefeasible by matter *ex post facto.* 4 Kent Com. (6th ed.) 463. Sterry v. Arden, 1 Johns. Ch. 261.

Upon examination of the uncontroverted evidence produced on behalf of the defendant, it is apparent that Paige conveyed the demanded premises to her to induce her to enter into an engagement to marry him. On the 11th of April 1853, his wife, Sarah Ann Paige, died at San Francisco. And in a letter bearing date the 24th of June then next following, addressed by him from that place to the defendant, then resident in this state, he offered himself to her in marriage. He urged her acceptance of his offer, and among other things said, "The estate"—referring to the demanded premises—"you may regard as your homestead, and I trust it will be a very dear spot to you, the same as it was to your dear Aunt Sarah, and the children of our mutual love." The import and significance of this proposal cannot be mistaken or misunderstood; it was manifestly tendered as an independent provision for her support, which might prevail upon and induce her

to accede to his wishes. On the 15th of the next ensuing month of July he wrote to his agent Goldsbury, enclosed in his letter a power of attorney from himself, and directed him to make, execute and deliver a deed of the demanded premises to her. Accordingly Goldsbury, in pursuance of the power and of the directions given to him, executed the deed, which was delivered to and accepted by her on the 8th of the following month of September. Of course, after the offer which had been made to her, she perfectly understood the object and purpose of the conveyance. And in a letter bearing date the 29th of October—which was a little less than two months after her acceptance of the deed—written and addressed by her to Paige, and which was received by him upon the 6th day of the ensuing month of December, on which day he acknowledged its receipt, she distinctly accepted his offer and made an unqualified promise to marry him. The correspondence between the parties was continued, and their contract to marry and be married to each other remained in full force during his life. Their marriage was prevented by his death, which occurred early in the following year, in Oregon, where he went on a journey of business to which he had alluded in one of his previous letters to her.

It is not alleged or pretended that the defendant had any knowledge or suspicion of the fraudulent acts of Paige. On the contrary, it is manifest from all the facts and circumstances which have been disclosed in the case that she believed and had reasonable cause to believe that he was a man of wealth, engaged in successful and prosperous business, and that throughout the whole transaction, and in contracting her engagement to him, she conducted herself in perfect good faith. The only question therefore is, whether her contract and promise to marry him constituted a good and valuable consideration for the estate which he had conveyed to her.

There is no doubt that marriage is a valuable consideration. It has always been so regarded. Chancellor Kent says it is held to be of high consideration, and of such weight and force that a marriage formally solemnized subsequently to the conveyance will make a mere voluntary deed good and effectual, and will fix the interest in the estate conveyed indefeasibly in the grantee. 4 Kent, Com. (6th ed.) 463. It was so expressly determined in the case of Steery v. Arden, above cited. And it is there stated by the court that, although nothing was said by the parties concerning the consideration for the conveyance,

either at the time of the solemnization of the marriage, or in the negotiation which preceded it, yet the law will presume that the property conveyed for that purpose did constitute some part of the consideration which induced the party who received it and who was to be benefited by it to enter into that relation. Huston v. Cantril, 11 Leigh, (Va.) 176. If, therefore, the defendant had been actually married to Paige on the 29th of October when she promised to marry him, she would be deemed to have been a purchaser for a valuable consideration, and would be held to have taken the estate conveyed to her, free and purged of any fraud against his partners or creditors which he might have committed. Her title in that case would have been clear and indefeasible. And in reference to the question of the sufficiency and value of the consideration, and consequently of the validity of the title acquired by the conveyance, there does not appear to be any real and substantial distinction between a marriage formally solemnized, and a binding and obligatory agreement, which has been fairly and truly and above all suspicion of collusion made, to form such connection and enter into that relation. All the consequences of a legal obligation accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall without legal excuse fail to fulfil it. But a contract of this kind is not to be regarded as a valuable consideration, merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfil it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material legal obligations to which it subjects them, negotiate a contract for such alliance with any other person. A woman who has voluntarily made such an agreement, cannot without indelicacy, and so not without exposing herself to unfavorable observation and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons for withdrawing from an engagement by which she has bound herself, for preferment in marriage; and thus her promise and agreement to marry a particular person essentially changes her condition in life. They materially affect not only her opportunities but her right to attempt in that way to improve it. A legal contract and promise made in good faith to marry another must, therefore, like an acual marriage, be deemed to be a valuable consideration

for the conveyance of an estate, and will justly entitle the grantee to hold it against subsequent purchasers, or the creditors of the grantor.

Applying these principles to the facts disclosed in the present case, it follows as a necessary consequence that the bill cannot be maintained. Judgment must therefore be entered for the defendant.

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## MOSHIER v. KNOX COLLEGE.

(Supreme Court of Illinois, 1863, 32 Ill. 155.)

Breese, J. . . . But apart from all this, the appellees ought to retain this decree, because it is shown the indebtedness was for the purchase-money of the premises, and appellant has not shown he was a *bona fide* purchaser for a valuable consideration, paying his money at the time on the faith of the title so purchased. It was incumbent on the appellant to show not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase-money. He must have paid it in fact before he had any notice of appellee' prior equitable title. That is an essential element in the equity, which must exist in order to support appellant's claim, which he attempts to uphold. If he has not paid the purchase-money, no wrong is done him by taking from him a legal title, which has cost him nothing. The answer does not aver that any part of the purchase-money has ever been paid, and he has failed to show that any was paid. It cannot, therefore, be said that the appellant had any equity to support his legal title, and, consequently, he ought not to retain it against the equitable title of the complainant. . . .

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## GOWER v. DOHENY.

(Supreme Court of Iowa, 1871, 33 Iowa 36.)

Day, Ch. J. . . . We are thus brought to consider in what manner the judgment creditor, purchasing at a sheriff's sale, and those holding under him, are affected by equities of third persons or their

claims under unrecorded deeds. It is well settled that a third person, who purchases at a sheriff's sale, without notice of outstanding equities, is entitled to the same protection as any other purchaser without notice and for value. The rule, however, as to the judgment creditor has oscillated somewhat, and can scarcely yet be regarded as settled in this State. . . . In the case of Evans v. McGlasson, 18 Iowa 152, the court united in holding that a judgment creditor, who becomes a purchaser at sheriff's sale, is protected at law against matters of which, at the time of the purchase, he had no notice, and that this rule also obtains in equity, unless there are equities of so strong and persuasive a nature as to prevent its application; and these, if they are relied upon, must be alleged and proved. As no such equities have been established in the present case, the doctrine of Evans v. McGlasson may be regarded as direct authority for sustaining the title of the plaintiff. But the rights of the judgment creditor received more direct recognition, in the case of Halloway v. Platner, 20 Iowa, 121, in which it was held that when a creditor merges his judgment into a title without actual or constructive notice of prior equities he becomes a purchaser, within the meaning of section 2220 of the Revision, and is entitled to equal protection, in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser. . . .

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## PUGH v. HIGHLEY.

(Supreme Court of Indiana, 1898, 152 Ind. 252, 53 N. E. 171.)

Baker, J. . . . The question is: Does a judgment creditor, who in good faith buys at a proper execution sale on his own valid judgment, take the land subject to prior secret equities?

The lien of a judgment attaches only to the actual interest of the debtor in the land. While the judgment remains unexecuted, the lien may be subordinated to any prior equity, though secret; for the creditor pays or surrenders nothing to or for the debtor, and continues to hold against the debtor his full claim, which the court has merely changed from a cause of action into a judgment.

A security for an antecedent debt will be upheld between the parties; but the taker will not be protected against prior secret equities, because he parts with nothing.

But a purchaser who pays the owner the value of the land takes the title clear of equities of which he has no notice.

And a creditor who, without notice, cancels a preexisting debt in consideration of his debtor's conveying him land, is a good faith purchaser for value. To hold that the debtor may sell his land to a stranger and turn over the purchase price (money, notes, goods, land) to his creditor in satisfaction of the debt, whereby the creditor is free from claimants of secret equities; and to hold that the creditor, if the debtor conveys the land to him in payment of the debt, is liable to be affected by secret equities,—is to approve the roundabout and involved, and to condemn the straight and simple, method of accomplishing the same result,—using the land to pay the debt. . . .

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## DUFF v. RANDALL

(Supreme Court of California, 1897, 116 Cal. 226, 48 Pac. 66.)

HARRISON, J. . . . A purchaser of real property at an execution sale stands in the same position as any other purchaser from the judgment debtor, and the certificate of sale which he receives from the sheriff is a conveyance within the meaning of the recording act, by which he is protected from the unrecorded claim of others, of which he did not have notice. In Foorman v. Wallace, 75 Cal. 552, certain property standing of record in the name of a judgment debtor had been purchased by the defendant at a sale under execution against him, but more than two years prior to the sale the judgment debtor had conveyed the property to the plaintiff. At the time of the purchase by the defendant this conveyance had not been recorded, but was recorded prior to the execution of the sheriff's deed. To the contention of the plaintiff that the sale by the sheriff was inoperative as against his unrecorded deed, the court said: "The transfer is not perfect until the execution and delivery of the sheriff's deed, but by the doctrine of relation the deed when thus executed is to be deemed and taken as though executed at the date when the lien, of which it is the sequence, originated," and held that the defendant's title obtained at the sheriff's sale was superior to that of the plaintiff under his unrecorded deed. (See, also Stewart v. Freeman, 22 Pa. St. 120; Atwood v.

Bearss, 45 Mich. 469; McMurtrie v. Riddell, 9 Colo. 497; Byers v. Engles, 16 Ark. 543.) By virtue of the principles thus declared, the title acquired by Randall under his purchase at the sheriff's sale must prevail over that held by the plaintiffs, of which he had no notice until after he had paid the purchase money, and received the certificate of sale. He is fully protected in this purchase, and his right to this protection is the same whether he received the notice of the plaintiff's claim before or after the execution of the sheriff's deed. He was a *bona fide* purchaser for value before the notice was given, and his rights cannot be affected by any notice given thereafter. . . .

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## SCHAFER v. REILLY.

(New York Court of Appeals, 1872, 50 N. Y. 61.)

ALLEN, J. . . . One who takes an assignment of a bond and mortgage, as did Mrs. Burchard in this instance, takes it subject not only to any latent equities that exist in favor of the mortgagor, but also subject to the like equities in favor of third persons and strangers.

Mrs. Burchard has taken especial care to foreclose all equities of the mortgagor, and should he attempt a defense to the mortgage, he would be precluded under one of the exceptions to the rule restricting the title which an assignee may acquire to the actual title of the assignee, adopted for the prevention of fraud. (McNiel v. Tenth National Bank, 46 N. Y. 325.) Eminent judges have pronounced in favor of a rule which would only subject the purchaser of choses in action to the equities of the debtors, and which would give them rights as they apparently exist against third persons, but these views have not prevailed. Bush v. Lathrop (22 N. Y. 535), may be regarded as putting the question at rest in this State, and the decision well supported by the opinion of Judge Denio, in which he reviews the cases bearing upon the question, and the dicta of the many judges who have alluded to the subject, commends itself as a just exposition of the law, as well upon principle as upon authority. He adopts the rule as expressed by Lord Thurlow, in Davis v. Austin (1 Ves. 247), "a purchaser of a chose in action must always abide by the case of the person from whom he buys."

## WILLIAMS v. DONNELLY.

(Supreme Court of Nebraska, 1898, 54 Neb. 193, 74 N. W. 601.)

HARRISON, C. J. . . . Whether such certificates are more than non-negotiable choses in action is not necessary here to consider or dedermine; for the purposes of the discussion, without deciding it, it may be conceded that they are not. The rule is that the assignee of a non-negotiable chose in action stands in the shoes of his assignor as to all equities existing between the original parties, or, in other words, receives it subject to all equities existing between the original parties at or prior to the assignment (2 Am. & Eng. Ency. Law (2nd ed.) 1080) ; but this does not apply as to equities between the assignor and a third person of which the assignee had no notice. (2 Am. & Eng. Ency. Law (2nd ed.) 1080, and note.) It was said by Chancellor Kent in Murray v. Lylburn, 2 Johns. Ch. (N. Y.) 441: "It is a general and well-settled principle, that the assignee of a chose in action takes it subject to the same equities it was subject to in the hands of the assignor. But this rule is generally understood to mean the equity residing in the original obligor or debtor, and not an equity residing in some third person against the assignor." There are decisions which support a contrary doctrine, but the weight of authority is favorable to the foregoing rule, and the reasons given for it are satisfactory; hence we will adopt it, and applying it to the existent conditions developed in the case at bar the portion of the decree of the district court by which the lien of the bank was accorded priority was correct and is affirmed.

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## STURGE v. STARR.

(High Court of Chancery, 1833, 2 M. & K. 195.)

William Starr bequeathed one sixth of the produce of his real estate to trustees, upon trust to invest the same and pay the dividends into the hands of his daughter Georgiana Whatford, or of such person

as she should appoint, to her separate use, and after her decease upon trust for the benefit of her children. The testator died in 1807. The ceremony of marriage was afterwards performed between Georgiana Whatford and a person named Wright, who was in fact married at the time to another woman. Georgiana Whatford lived with Wright in ignorance of the fact of his prior marriage and received the dividends of the trust fund until the year 1816, when she and her supposed husband contracted to sell her interest in the legacy to John Sturge for the sum of £333 14s., which sum was paid to her and Wright, and a deed of assignment to Sturge, dated the 22nd of June 1816, was executed by them jointly. The bill was filed by Sturge against the representative of the surviving trustee of the trust fund, and Georgiana Whatford, for the purpose of obtaining the benefit of the assignment.

On the part of the defendants, it was contended by Mr. Treslove that the transaction was tainted by the fraud of one of the parties to it, assuming a false character, and imposing as well upon Georgiana Whatford as upon the Plaintiff, was not such an instrument as a court of equity would carry into execution. It was like the case of a legacy given to a person in a character which did not belong to him, and which he had fraudulently induced the testator to believe that he sustained. . . . It was also insisted that Wright ought to have been made a party to the suit.

THE MASTER OF THE ROLLS. The false character under which Wright acted cannot affect the validity of this transaction. The property was Georgiana Whatford's; and the instrument by which it was assigned was her instrument, not her supposed husband's. She might not have executed such an instrument had she been aware of the fraud that had been practiced upon her by Wright; but that fraud could not affect the right of a *bona fide* purchaser. Wright's participation in the execution of the instrument must be considered as nugatory. It is not necessary, therefore, that he should be a party to the suit.

## HULING v. ABBOTT.

(Supreme Court of California, 1890, 86 Cal. 423, 25 Pac. 4.)

THORNTON, J.—Action to foreclose a mortgage on a parcel of land situate in Humboldt County. Defendant Abbott was the mortgagor.

Abbott made default, judgment of foreclosure was made and entered against defendants, and from this judgment defendant Bull alone prosecutes an appeal. The following facts are found: On July 7, 1885, Abbott was the owner of the tract of land which he, on the 28th of July, 1886, conveyed to plaintiff by mortgage to secure the payment of a debt due by Abbott to the plaintiff. Abbott's title to this land was derived under a certificate of purchase from the state of California bearing date the day first above mentioned. On the 28th of July, 1886, Abbott assigned his certificate of purchase, and all his title in the land mentioned therein, to one M. H. Crissman, who purchased with actual notice of the existence of plaintiff's mortgage. On April 15, 1887, Crissmon assigned the certificate of purchase and all his title in and to said lands to C. C. Fitzgerald. Fitzgerald purchased with actual notice of the existence of plaintiff's mortgage, and agreed, as part consideration for the assignment, to pay at maturity the debt secured by the mortgage, and for this purpose retained in his hands from the purchase price the full amount of the principal and interest due on the debt. On July 1, 1887, Fitzgerald assigned the certificate of purchase, and all his title to said lands, to one R. W. Rideout, who at the time of his purchase had no knowledge of the existence of plaintiff's mortgage. Thereafter, Rideout, while the owner of the land, received from the state of California, as assignee of the certificate of purchase, a patent for said lands. The plaintiff placed the mortgage on record in the proper office in the county of Humboldt on the nineteenth day of September, 1887. On the 20th of October, 1887, and while the mortgage of plaintiff was of record, Rideout conveyed the lands described in the certificate of purchase above mentioned to the above-named C. C. Fitzgerald. On the second day of January, 1888, Fitzgerald conveyed to the defendant Bull (appellant here) the lands above referred to. At the date of the conveyance last named, Bull had full notice of the record of plaintiff's mortgage, and of the execution and existence of such mortgage.

On the facts above stated, the court rendered judgment in favor of plaintiff. We think the judgment should stand. When Fitzgerald, who was the grantor of Rideout, and who had actual notice of plaintiff's mortgage when he purchased and at the time he conveyed to Rideout, received a conveyance from the latter, he occupied the same position he formerly did; viz., that of a purchaser with notice of

plaintiff's rights and equities. He was not protected by the fact that Rideout, his grantor, was an innocent purchaser. (Talbert v. Singleton, 42 Cal. 391; 2 Devlin on Deeds, sec. 748; 2 Pomeroy's Eq. Jur., sec. 754.) When Fitzgerald secured the conveyance from Rideout, he occupied the same position he did when he purchased from Crissmon,—that of a purchaser with notice of and bound by all the equities of Huling. The court finds that Bull took his conveyance from Fitzgerald with full notice of plaintiff's equities. We cannot see in what way the conclusion can be avoided that plaintiff had a right to enforce his rights against Bull. It may be further observed that it does not appear that Bull paid any money on his purchase. He must, then, be held to occupy the same position that Fitzgerald did, and alike subject to the enforcement of plaintiff's rights.

Judgment affirmed.

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## MURDOCK & DICKSON v. FINNEY.

(Supreme Court of Missouri, 1855, 21 Mo. 138.)

SCOTT, J. 1. This case appears to turn on the law respecting the assignment of choses in action. The law on this subject seems to be well settled. As between the assignor and the assignee, the equitable right will pass without any notice to the debtor; for the assignor is bound from the moment of the contract. But if the assignee means to go further and make his right attach upon the thing assigned, it is necessary to give notice to the debtor or trustee of the assignment. But if, after a chose in action is transferred by its owner, it is assigned a second time, and the last assignee first give notice to the debtor of his right, his equity will be superior to that of the first assignee who has neglected to give notice; for, by such failure, the first assignee has enabled the owner of the chose in action to commit a fraud by making another sale. The second purchaser, by enquiring of the debtor, might have learned whether the debt had been transferred, or if notice of the transfer had been given to the debtor, he, after such notice, would pay the debt to another at his peril. The precaution of making enquiry is always taken by a diligent purchaser, and if it is not taken, there is neglect, and no relief is extended to him who has been guilty

of it. If both assignees give notice at the same time, or if there is no notice by either assignee, then the rule *qui prior est in tempore potior est in jure* prevails, and the first assignment will be sustained. So that it is seen that notice to the debtor or trustee is necessary, in order to make a perfect and indefeasible assignment of a chose in action. (Dearle v. Hall, 3 Eng. Con. Chan. 266; Heath v. Powers, 9 Mo. Rep. 765.) . . .

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## LEE v. HOWLETT.

(High Court of Chancery, 1856, 2 K. & J. 531.)

Timothy Tripp Lee, by his will, dated the 30th of June, 1840, amongst other devises, gave to his wife Elizabeth (since deceased) certain freehold and leasehold hereditaments, known as Dell's Manor farm, to hold the same for her life; and, after her decease the testator directed that the same should be sold by public auction, and that the money should be equally divided among his surviving children; and the testator devised and bequeathed the residue of his property, as well funded or otherwise, to his wife for her life, and after her death, to be equally divided amongst his surviving children. And he appointed his wife, and his sons, the Plaintiff Timothy Lee and Cornelius Lee (since deceased), executrix and executors of his will.

The testator died on the 29th of December, 1840, leaving his widow and eleven children surviving him.

By a deed of arrangement, dated in 1841, and executed by all the children, (except one who had died), it was mutually agreed that all the property devised by the testator amongst his surviving children, should be divided and disposed of, subject to the life interest therein, in life manner and shares as if the same had been given, subject as aforesaid, amongst all his children who should survive him, equally, as tenants in common, so that one equal eleventh part or share thereof should go and be paid and payable to each and every, or to the executors, administrators, or assigns of each and every, the said &c. (the children), notwithstanding any or either of them the said &c. should die before the property should become divisible or payable, and the executors or administrators of any of them who might so die should

receive his or her eleventh share, and apply the same as his or her personal estate &c.

Charles Lee, one of the children, by indenture, dated the 24th of March, 1842, mortgaged his reversionary share and interest of all the property under the will and deed of arrangement to one Simon Main, to secure £450 and interest, of which indenture the Plaintiff Timothy Lee had not received notice till the year 1848.

By indenture, dated February 14th, 1844, Charles Lee again assigned his share to a Miss Lys to secure £250 and interest; of which indenture Miss Lys gave notice to the Plaintiff in May, 1844.

At the time of the mortgage to her, Miss Lys had no notice of the prior mortgage.

By indenture dated the 1st of October, 1846, Charles Lee again assigned his share to one Gashes to secure a sum of £300 and interest; of which indenture Gashes gave notice to the Plaintiff in the same month of October, 1846.

The testator's widow having died in 1854, this suit was instituted by the Plaintiff for the administration of the real estate; a previous suit of "Lys v. Lee" had been instituted by Miss Lys to realise her security out of the personal estate, which however was wholly exhausted, leaving nothing but the real estate and its produce for the incumbrancers to look to.

A decree for sale had been made in this suit (Lee v. Howlett), and the usual inquiry directed as to incumbrances on the shares of the children.

Pursuant to the decree Dell's Manor farm had been sold for £3400, and the residuary estate for £500. The Chief Clerk certified as to the incumbrances, and, amongst others, to those on Charles Lee's share as above; the result of his finding being, that the several mortgages, Vaughan (in whom Simon Main's mortgage had become vested), Miss Lys, and Gaches, were entitled according to the date of their incumbrances. But it was arranged that the question of priority, with reference to the dates of the several notices given to the plaintiff, should be argued before the Court on the hearing for further consideration. . . .

Vice-Chancellor Sir W. Page Wood. I am of opinion, that as to that portion of the property which was ordered to be sold, I am bound to hold, on the principle of Foster v. Cockerell, 9 Bligh., N. S.

332; 3 Cl. & F. 456; Deale v. Hall, 3 Russ. 1 and that class of cases, that the incumbrancer who first gave notice of his incumbrance must prevail over the others. The principle does not depend simply on a question of mala fides; but the rule is, that the party who first makes himself master of a chose in action, by giving notice, to prevent its being handed over by the person in whose hands it is to any other claimant,—in other words, who first devests the title of the owner by giving notice to the person through whom the owner must derive the fund—arrests that fund, and acquires the property for himself. Whether the fund be a trust fund held by A in trust for B, or a debt payable by A to B, if B assigns, and his assign requires A to pay the money over to him, that gives him priority over a previous assign of B, who has not given such notice.

It is decided, that this doctrine does not apply to real estate; and in Wiltshire v. Rabbits, 14 Sim. 76, the late Vice-Chancellor of England considered that the doctrine was not applicable to an assignment of an equitable interest in a chattel real. In this case, part of the property is directed to be sold, without saying by whom. The sale must be by the heir or executors. Here, the same person fills both those characters, and the property must therefore pass through him. It must be converted into money, and none of the legatees could have reached that money except through him; and they could never have had the property in the shape of land, but only as money. Then, the executor being bound to pay the shares in this manner, the fact, that, at the time when this security was given, the period for the sale had not arrived, is not material. Whenever the property was sold, and the money paid to the executor, he would hold part of it for Charles Lee, or for the person who had obtained an assignment of his share from Charles Lee. Here, Miss Lys first gave to the executor notice of the assignment in her favor, and therefore she has priority over all other assigns of Charles Lee's share as to this part of the mortgaged property.

As regards the residuary real estate, there is no direction in the will to sell that. It was devised to the testator's wife for life, and after her death to her children. That would carry the fee simple, and the children would not be obliged to take their shares from the hands of any third person; and although, by the deed of arrangement, they seem to have treated it as personal estate, it was in their

own hands; and therefore there can be no question of notice as to this property, but it must go to the incumbrancers according to the order in time which they obtained their securities.

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## SKILES v. SWITZER.

(Supreme Court of Illinois, 1850, 11 Ill. 533.)

This was a bill in chancery, filed by Switzer and others against the appellants, to set aside certain conveyances and mortgages, made as is alleged, in fraud of creditors. . . .

CATON, J. It is a fatal objection to this decree, that the infant heir of Udell was not a party. The legal title to the property in controversy descended to her, and although her father held it in trust, yet no decree, divesting her of that legal title, could be binding upon her, unless she was properly represented by a guardian appointed to protect her interest. The primary object of the decree was to divest her of the legal title, and as that was not legally done, the balance of the decree, which provides for the disposition of the proceeds of the property, must necessarily be reversed also, for there is nothing upon which it can operate. . . .

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## CORNWELL v. ORTON.

(Supreme Court of Missouri, 1894, 126 Mo. 355, 28, S. W. 893.)

GANTT, P. J. . . . Again, the doctrine of courts of equity is that equitable estates are considered to all intents and purposes as legal estates. In the construction of the limitations of a trust, courts of equity follow the rules of law applicable to legal estates. The *cestui que trust*, or beneficiary, takes the same estate in duration as in a legal estate, and the estate granted is subject to the same incidents, properties and consequences as belong to similar estates at law. They are alienable, devisable and descendible in the same manner. They are alike subject to dower and curtesy. It is true at one time a widow was not dowable of a trust estate but both in England and in this

country a widow is now dowable in an equitable estate. As to curtesy, actual possession of the estate or the receipt of the rents, issues, and profits by the wife or possession by her trustee for her benefit is equivalent to legal seizin. These principles are elementary.

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## JOHNSTON v. SPICER.

(New York Court of Appeals, 1887, 107 N. Y. 185, 13 N. E. 753.)

Ruger, C. J. . . . The respondents assert that no claim is made that rights of action escheat to the People, and such seems to have been the theory entertained by the General Term. In the strict sense of the term escheat, perhaps, this may be so, but we assume it to be the law in this State that all rights of property, of whatever nature they may be, revert to the People when the owner dies intestate, and there is a failure of heirs or next of kin, to take such property. We believe it to be the established rule in all civilized countries that, in such case, the property of a resident dying intestate without heirs, reverts to the Sovereign or State, to be administered for the general benefit of the community in which he dies. While there is an absence of specific statutory authority declaring the rights of the State in such property, it is believed to be the uniform practice for it to assume by force of natural law, the control of such property, and to administer it for the benefit of those concerned, and, in the absence of any legal heir, to appropriate the proceeds to the uses of the State.

It is said, in 4 Kent's Commentaries, 425, "It is a principle which lies at the foundation of the right of property that, if the ownership becomes vacant, the right must necessarily subside into the whole community in whom it was originally vested when society first assumed the elements of order and subordination." In a note, it is stated, "the escheats spoken of in the text relate exclusively to land, movables never escheated in the technical sense; and if the owner died intestate and left no lawful representatives, the personal estate remained at the disposition of the crown. In this country it must vest in the State, and so the statute law in some of the States has specially provided." In Perry on Trusts (§ 327), it is said that it was held in Burgess v. Wheate (1 Ed. 177), "that if the *cestui que trust* left no heirs, the

trust estate did not escheat, but that the trustee thenceforth held the estate discharged of the trust." "This is upon the principle that there is no want of a tenant to the land, the trustee being clothed with all the rights of ownership, against all the world except the *cestui que trust* and those claiming under him. But this principle does not apply to chattels where there can be no tenant, nor to leaseholds, nor to an equity of redemption. In the United States, trustees would hold personal property subject to the right of the State as *ultima hieres* in case the *cestui que trust* died without heirs or next kin, and it is conceived they would hold real estate under the same rule." Washburn on Real Property (vol. 3, p. 49) says: "While escheat was regarded as an incident of feudal tenure, it did not extend to the equitable estates of *cestui que trust,* and, by analogy, it is generally understood that if a *cestui que trust* dies intestate, without heirs, the trust fails, and the trustee holds an absolute estate in the property free from the claim of any one. But it is settled by the courts of Maryland, and intimated by Judge Kent in respect to New York, that such would not be the case under the statutes and that if a *cestui que trust* should die without heirs, his equitable estate would escheat to the State." . . .

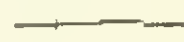
From this review of the law it would seem that there is no substantial difference between real and personal property in respect to the rights acquired by the State, upon the death of its owner, intestate, without heirs or next of kin. A clear deduction from the authorities seems to lead to the conclusion that the doctrine of escheat applies only to legal estates and does not in a strict sense affect either equitable estates or personal property. It seems also to follow from the authorities cited, that upon the death of Ellen Spicer the State took not the land, but succeeded to the equitable right which she had to a conveyance thereof. This right may possibly be subject to the claims of the creditors, or other equities which would have to be adjusted in an action, by the equitable owners to recover the possession of the land.

The omission in the provisions of the Revised Statutes of the words "died seized of" as contained in the Revised Laws of 1813, relating to escheats is not supposed to have effected any change in the law as the revisors say in their note to this section that it is "new in terms but implied in Revised Laws (380, § 2)." A new rule, however, was intended to be introduced by section 2 of the Revised Statutes, which provides that all escheated lands shall be held by the State or its

grantees subject to the same trusts, etc., to which they would have been subject had they descended. This enactment was intended to obviate the severe rule of the common law by which such lands when escheated were held to belong to the king free from the trust. (Revisors' Notes, 5 N. Y., Statutes at Large (Edm. Ed.), 297.)

With reference to the personal estate of persons dying intestate without next of kin, it appears to have been the uniform practice of the State since its organization to take such property, and hold it either for the benefit of the community at large or some division of the State, or to be returned to such persons as may from considerations of natural justice and equity seem to the legislature to be entitled thereto.

We think therefore, that the property left by Mrs. Spicer reverted to the State upon her death, and that it was competent for the legislature to grant the rights thereby acquired, and the right to administer thereon to such person or persons as in their discretion they judged equitably entitld thereto. (Englishbe v. Helmuth, 3 N. Y. 294.) . . .



## BARKER v. SMILEY.

(Supreme Court of Illinois, 1905, 218 Ill. 68, 75 N. E. 787.)

On January 25, 1904, Aura W. Barker filed her petition in the circuit court of Cook county against Mitchell J. Smiley praying for an assignment of her dower in certain premises commonly known as No. 2815 Prairie Avenue, in the city of Chicago. The principal facts as alleged in the petition are as follows: On December 26, 1867, the petitioner was married to one Samuel B. Barker, who died on or about December 30, 1903. On April 30, 1886, Samuel B. Barker, for the consideration of $50,000 acquired the fee simple title to the premises in question, and from the date of the purchase until March 21, 1900, he and his wife occupied it as a homestead. Notwithstanding the title was taken in the name of Samuel B Barker it is claimed that the purchase was for the petitioner, and he held the title in trust for her until February 2, 1891, when, in consideration of love and affection and one dollar, he conveyed the same to her by warranty deed, which deed was delivered to her and afterwards placed in the

hands of her husband to be placed on record, which he failed to do, and the deed was not recorded until in May, 1893. Petitioner does not claim that the creditors of Samuel B. Barker had any knowledge or notice of this conveyance, but that on the date it was made he was solvent. Samuel B. Barker was engaged in the lumber business in the city of Chicago, and on May 29, 1893, was insolvent. On that date he again conveyed the premises in question to the petitioner by a warranty deed, which was duly filed for record. On May 31, 1893, the Union National Bank of Chicago obtained a judgment, by confession, against Samuel B. Barker for $50,732.75, and execution was issued upon the judgment and levied upon the premises in question. On June 28, 1893, P. A. Lane obtained a judgment, by confession, in the superior court of Cook county against Samuel B. Barker for $3,516.50. Execution was issued upon the judgment and returned, no property found. On July 1, 1893, Lane filed a creditor's bill in the superior court of Cook county against Samuel B. Barker, the Union National Bank and the petitioner, in which he sought to set aside the deed of May 29, 1893. On July 6, 1893, P. A. Lane recovered another judgment in the superior court of Cook county against Samuel B. Barker for $2701.19. An execution was issued upon the judgment and returned no property found. On July 11, 1893, Lane filed another creditor's bill against the same parties for the purpose of setting aside the deed, and on October 18, 1893, the two cases were consolidated. On December 13, 1893, the Union National Bank filed a creditor's bill in the superior court of Cook county against Samuel B. Barker, P. A. Lane, the petitioner, and other judgment creditors of Barker, for the purpose of setting aside said deed of conveyance. Upon answers being filed in the various cases a decree was entered, which found that Aura W. Barker, was not, as against the complainants and cross-complainants, the owner of the premises, except that she was entitled to the sum of $1000 out of the proceeds of said property when sold, for her homestead rights. The premises were ordered sold free and clear of any right, claim or interest of Aura W. Barker. On March 21, 1899, the premises were sold by the master of chancery to the Union National Bank for $35,000. The master paid the $1000, as directed in the decree, to Aura W. Barker. On March 21, 1900, the bank conveyed the premises to the appellee, Mitchell J. Smiley, who thereupon entered into possession, and has continued in possession

ever since. The further allegation of the petition is, that the defendant, Mitchell J. Smiley, combined and confederated with other persons for the purpose of injuring and defrauding the petitioner, and he claims that by virtue of the proceedings between the Union National Bank and P. A. Lane, and the decree therein entered, petitioner's inchoate right of dower was directed to be sold, and was sold, and that the purchaser took the premises clear and divested of her dower. The petition alleges that the premises were sold subject to her dower, that she has a right of dower therein, and prays that the same be set off to her. . . .

WILKIN, J. . . . At the time the property was purchased by Samuel B. Barker, it is claimed that the purchase was made for the petitioner but the title was taken in the name of the husband in trust for her. If these facts are true, the wife would certainly have no dower interest in the property. Dower, at common law, was an estate for life, to which the wife was entitled, on the death of the husband, in the third part of the legal estates of inheritance, in lands and tenements of which the husband was seized, in deed, or in law, in fee simple, or in fee tail, at any time during coverture, and to which any issue which the wife might have had might by any possibility have been heir. (Sisk v. Smith, 1 Gilm. 63; 10 Am. & Eng. Ency. of Law, —2nd ed.—125.) While this rule of the common law has to some extent been modified by statute, yet these modifications have not materially varied the above rule as it is applicable in this case. The conveyance to the husband was merely in trust for the wife. She had the equitable title and he held the naked legal title, which she could have compelled him to convey to her. No right of dower attaches to an estate in which the naked legal title is held in trust for a second party. (King v. Bushnell, 121 Ill. 656.) For this reason, if the title was in the husband in trust for the wife she could claim no dower therein.

There is another good reason why the decree dismissing the petition is correct. At the time of the hearing upon the creditors' bills the petioioner filed her answer, in which she set up the fact of the original purchase having been made for her; that the title was held in trust for her by her husband. That he executed the deed of February 2, 1891, and she asked that her rights be adjudicated. At the time of the hearing she was represented by eminent counsel, who forcibly presented her claim to the court, but notwithstanding this the decree,

upon the merits, was against her. It found that the conveyance of May 29, 1893, was in fraud of creditors, that the premises belonged to the husband, ordered a sale, and provided for the payment of $1000 to her for her homestead. In pursuance of that decree the premises were sold and the deed of conveyance made by the purchaser to appellee. The court had jurisdiction of the person of all the parties, including the petitioner, and also had jurisdiction of the subject matter. The decree, as rendered, was never reversed, but is now in full force and effect and fully executed. To now permit appellant to again litigate these questions would be to give no force or effect to a judicial decree to which she was a party and to entirely set aside a judicial sale properly made. The decree as rendered in the former case was *res judicata* of all matters set up in this petition.

Complaint is made that the premises were sold as the property of the husband, and therefore the wife is entitled to dower. We have nothing to do with the justice, reasonableness or correctness of that decree. It cannot be collaterally attacked, and if it was wrong it was the duty of appellant to appeal from it and in this way preserve her rights. If she is injured by the decree and has lost her dower she has no one to blame but herself. If the property was hers originally she should have had the title taken in her name. When the deed was made to her she should have filed it for record. If she had attended to these matters at the proper time and in the proper way she would now be the owner in fee, but as it is she has slept upon her rights, and therefore must bear the burden of her own negligence. She recognized the provisions of the decree by accepting $1000 of the purchase money in lieu of her homestead, and it would certainly be as unjust to permit her to have dower as it would be to again permit her to claim her homestead.

We find no reversible error, and the decree of the circuit court dismissing the petition will be affirmed.

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## JAMISON v. ZAUSCH.

(Supreme Court of Missouri, 1909, 227 Mo. 406, 126 S. W. 1023.)

BURGESS, J. This is a suit to partition two parcels of ground in the city of St. Louis, at the southwest corner of Prairie and Easton

avenues. Plaintiff is the widower of Mary Jamison, to whom he was married in 1865, and who, at the time of her death, was the owner of the two parcels sought to be partitioned. . . .

The sole material question on this appeal is, whether the deed from Kilpatrick and wife deprived the plaintiff of the interest which he claims under the provision of the Act of 1895 (section 2938, Revised Statutes 1899), which reads: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts."

In construing the terms of deeds creating separate equitable estates in the wife this court has uniformly based its conclusions upon what is found to be the intention of the parties, as ascertained from the language employed in the instrument. The rule is that if the grant or devise be to the wife for her separate use, and it clearly appears from the conveyance or will that it was the intention of the grantor or devisor that the husband should not be tenant by the curtesy, this intention will govern, and the husband will not be entitled to curtesy. (Tyler on Infancy and Coverture (2 Ed.), p. 431; 1 Washburn on Real Prop. (6 Ed.), sec 321, p. 147; McTigue v. McTigue, 116 Mo. 138; McBreen v. McBreen, 154 Mo. 323; Woodward v. Woodward, 148 Mo. 241.)

We think that the terms of the deed in question make it very plain that it was the intention of the grantors to wholly deprive the plaintiff, husband of Mrs. Jamison, of his right of curtesy in the land conveyed.

In the McTigue case, supra, the deed under which both parties claimed was in its terms very similar to the Kilpatrick deed, except that the trustee named therein was not the husband of the beneficiary as in this case. It was held in that case that by the terms of the deed an equitable estate of inheritance was vested in the wife, which upon her death intestate, descended to her legal heirs, free from the curtesy of her husband.

In the McBreen case, supra, the court said: "Indeed it is the prevailing doctrine in England and the United States that it is not competent at common law, in a grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy; but it is

equally well settled that in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention, to exclude and deprive the husband of curtesy;" citing Tiedeman on Real Prop. (2 Ed.), sec. 105; McTigue v. McTigue, 116 Mo. 138; Grimball v. Patton, 70 Ala. 635; Rigler v. Cloud, 14 Pa. St. 361; Pool v. Blakie, 53 Ill. 495; Haight v. Hall, 74 Wis. 152.

The plaintiff rests his case principally upon the authority of O'Brien v. Ash, 169 Mo. 283. But that case is essentially different from the case at bar. The deed construed in that case was also a conveyance to a trustee for the sole and separate use of the wife, free from the husband's curtesy, and it was held that the deed undertook to cut off the marital rights of only her then husband, and not of any future husband she might have. The husband referred to in the deed having died, the court held that the trust thereupon ceased and terminated, and the use became executed in the beneficiary, and did not thereafter, upon the remarriage of the beneficiary, revive and revest in the trustee. After so construing the deed, the court adds: "In this view of the case, it is unnecessary to discuss whether the Act of 1895 could affect property held by a woman, married or unmarried, under a deed of settlement so formulated as to create a separate equitable estate to the exclusion of all marital rights of any future husband." In that case the court also said: "So long as plaintiff's wife was alive to enjoy the use of her property it belonged to her free from legislative interference, and the Act of 1895 could have no effect or influence upon it, or of her use or disposition of it whatever; but when death came, and she could no longer enjoy it, her acquisition ceased, and with it the right to direct its future use and ownership only as the legislative will was indicated by the statute then in force upon that subject." . . .

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## IN RE BELLAMY. ELDER v. PEARSON.

(Supreme Court of Judicature, 1883, 25 Ch. D. 620.)

By a deed of settlement, dated the 3rd of May, 1865, hereditaments held for long terms of years were assigned to trustees upon trust for Ann Bellamy for life, and after her death upon trust for Charles Gamble for life, and after his death upon trust for Susan Patten, for life, and "from and after the death of the said Susan Patten, then

upon trust to assign and assure the said leasehold premises unto Miriam Patten for her own use and benefit absolutely."

Miriam Patten married John Culmer in September, 1870, and died on the 21st of December, 1882, leaving him surviving. . . .

KAY, J. The question is whether it is necessary for Mr. Culmer to take out administration to his wife in order to complete his title to these leaseholds.

There is no doubt that as to all chattels real of the wife vested in possession during the coverture the husband surviving need not take out administration to the wife. And the rule is the same as to an equitable term.

The cases, which I have examined in the original reports, are collected in Williams on Executors, 8th Ed. vol. i, p. 701. In the same place it is stated, "But to entitle the husband to the chattels real of the wife, which were not vested in his possession in her right in her lifetime, he must make himself her representative by becoming her administrator. As if a *feme sole* be possessed of a chattel real and be thereof dispossessed, and then take husband and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife."

The illustration there given seems to shew that the writer was referring to a mere right of action, and this is confirmed by the reference to Co. Litt. Page 351, a., where the words are, "Chattels real consisting merely in action, the husband shall not have by the intermarriage, unless he recovereth them in the life of the wife, albeit he survive the wife, as a writ of right of ward," &c., "whereunto the wife was entitled before marriage."

But then it is argued that if this be not a mere right of action, being an interest in remainder in leaseholds for years after a life estate it is only a possibility, and so could not vest in the husband. Lampet's Case, 10 Rep. 46, b., is an authority for the proposition that such an interest was considered a possibility, which at that time could not be granted or assigned to a stranger during the life of the tenant for life, though it might be released to the person in possession. This, however, has long been overruled.

In Donne v. Hart, 2 Russ. & My. 360, a reversionary interest after a life estate in leaseholds for years was held to be assignable by the husband of the reversioner during the existence of the life estate,

and this although the reversionary interest was contingent. It is there stated that it is clear that the wife's contingent legal interest in a term may be sold by the husband, and there is no difference in equity between the legal interest in and the trust of a term.

In Duberley v. Day, 16 Beav. 33, a reversionary interest in leaseholds belonging to a wife was held to be assignable by the husband, if it were of such a nature that it might by possibility vest in the wife in possession during the converture, and the doctrine that such a reversion was a mere possibility of the wife, and as such could not be assigned, it was said is "undoubtedly exploded by the later decisions."

Accordingly I must take it to be settled that a vested reversionary interest, subject to a life estate in leasehold property, which might by possibility come into possession during the coverture is no longer treated as a mere possibility which is unassignable, but it is like any other chattel real of the wife in this respect at least, namely, that the husband can assign it during the coverture, and while it is still reversionary.

I am, therefore, unable to consider such an interest as a mere right in action, or indeed as a right in action in any true sense of those words, and consequently it does not seem to me necessary on principle or authority that the husband surviving (although the wife died before the interest vested in possession), should take out administration to the wife in order to complete his title. . . .

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## RHOADES v. BLACKISTON.

(Supreme Court of Massachusetts, 1871, 106 Mass. 334.)

Contract for breach of an agreement to sell and deliver coal. At the trial in this court, before Colt, J., the plaintiff testified that after the making of the alleged agreement, and its breach by the defendants, he was adjudged a bankrupt; "that he made the agreement while acting as agent of Alonzo V. Lynde, under authority from him and made it as agent; and he owed Lynde a large sum of money, and had transferred his coal business to him as security for the debt; that it was agreed between them, that Lynde was to furnish the capital, and was to receive all the profits of the business, except enough to support the plaintiff and his family, until the debt should be paid; that after the

debt was paid the property was to be his, and the profits of the business; and that he had no property in the coal, or interest other than as stated, and his own money was not invested in the business; but that he was to have his living out of the business until the debt was paid."

The defendants objected that the plaintiff could not maintain the action, and the judge reported the case for the determination of the full court, if the court should be of opinion that the plaintiff could not maintain the action, judgment to be for the defendants, otherwise the case to stand for trial. . . .

Colt, J. . . . The defendants further contend that the plaintiff's right of action passed to his assignees in bankruptcy, who were appointed in procedings commenced after the alleged breach. It appears that the plaintiff made the contract in the course of a business which he was carrying on for Alonzo V. Lynde, and which he had previously transferred to Lynde as security for a debt, with the agreement that after the debt was paid the property was to be his with the profits of the business, Lynde furnishing all the capital and receiving all the profits, except enough for the support of the plaintiff and his family, until his debts should be paid. And it is claimed that upon these facts the plaintiff had such a legal and equitable interest in the contract that it must pass by the bankruptcy proceedings to the assignees.

Assignees in bankruptcy do not, like heirs and executors, take the whole legal title in the bankrupt's property. They take such estate only as the bankrupt had a beneficial as well as legal interest in, and which is to be applied for the payment of his debts. To a plea that the plaintiff is a bankrupt, and that all his estate vested in his assignees, it is a good replication that the whole beneficial interest in the contract or demand in suit was vested by prior assignment in a third party, for whose benefit the suit is prosecuted. If however the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title vests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time. Webster v. Scales, 4 Dougl. 7; Winch v. Keeley, 1 T. R. 619; Carpenter v. Marnell, 3 B. & P. 40. . . .

The court are of opinion that the rule in these cases. . . . cannot be applied to defeat the plaintiff's action here. The pledged prop-

erty consisted of a business to be carried on with the capital of the party to whom it was transferred. The contracts made in the course of it were the contracts of the principal. The agent had no immediate beneficial interest in them. His interest was only in the future profits, and that contingent on their being sufficient to pay the debt he owed. The contract of Lynde to restore the property to the plaintiff was executory, and there was no claim that the contingency had happened upon which the business and property were to become the plaintiff's. The inference from the facts reported is, that it did not. The support which he was to have for himself and his family was plainly in compensation for his agency in the business. And there is nothing to show that the creditors in bankruptcy have any valuable interest in the contract declared on. . . .

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## TILLINGHAST v. BRADFORD.

(Supreme Court of Rhode Island, 1858, 5 R. I. 205.)

Demurrer to a bill in equity, filed by the plaintiff as assignee, under the "poor debtor's act," of Hezekiah Sabin the younger, against him, and against Nicholas H. Bradford, trustee under the will of Hezekiah Sabin, Sen., of certain real estate situated in Westminster Street in Providence, held by said Bradford in trust for the benefit of said Hezekiah the younger. . . .

AMES, C. J. The demurrer to this bill is attempted to be supported, substantially, upon two grounds: First, that Hezekiah Sabin, Jr., had not such an equitable interest, under his father's will, in the trust property in question, that he could aliene the same to the plaintiff in trust for his creditors. . . .

The nature of the debtor's interest in the trust property, under his father's will, was an equitable estate for life, with a power of disposing of the remainder in fee by will; in default of such disposition such remainder to be conveyed to his heirs at law; there being also a clause in the will against anticipation and alienation of the rents and profits during the debtor's life. It is quite clear, that it was the intention of the testator to make an alimentary provision for his son during life, which should give him all the advantages of an estate in

fee, without the legal incidents of such an estate,—inalienability, unless by will, and subjectiveness to the payment of the son's debts. Such restraints, however, are so opposed to the nature of property,—and, so far as subjectiveness to debts in concerned, to the honest policy of the law,—as to be totally void, unless indeed, which is not the case here in the event of its being attempted to be aliened, or seized for debts, it is given over by the testator to some one else. This has been the settled doctrine of a court of chancery, at least since Brandon v. Robinson, 18 Ves. 429; and in application to such a case as this, is so honest and just, that we would not change it if we could. Certainly, no man should have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice. . . .

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## STEIB v. WHITEHEAD.

(Supreme Court of Illinois, 1884, 111 Ill. 247.)

Mulkey, J. Asahel Gridley, by his last will and testament, devised to trustees certain valuable real estate, upon the following trusts, namely: "To keep said lands and tenements well rented; to make reasonable repairs upon the same; to pay promptly all taxes and assessments thereon; to keep the buildings thereon reasonably insured against damages by fire; to pay over all remaining rents and income in cash, into the hands of my said daughter, Juliet, in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliet. . . .

The trustees named in the will having refused to act, by a proper proceeding in chancery William H. Whitehead, the defendant in error, was duly appointed trustee in their stead, and thereupon took possession of the devised premises, and otherwise assumed the duties of the trust. Certain moneys, being a part of the rents and profits of the estate, having come into his hands, as trustee, and which, under the provisions of the will, it was his duty to pay over to Juliet, the daughter, were attached in his hands by one of her creditors. The trustee appeared and filed an answer, as garnishee, setting up the trust and the special provisions of the will above cited, and the question presented

for determination is, whether the money thus held by him was subject to garnishment.

The authorities are not in accord on this subject. Under the rule as laid down by the courts of England, and by the courts of final resort in a number of states of the Union, the fund attached would clearly be subject, in equity, to the payment of the daughter's debts. (Tillinghast v. Bradford, 5 R. I. 205; Smith v. Moore, 37 Ala. 330; Heath v. Bishop, 4 Rich. Eq. 46; McIlvain v. Smith, 42 Mo. 45.) A contrary rule prevails in Pennsylvania, Massachusetts, and perhaps other States, which seems to be supported by the reasoning of the Supreme Court of the United States in Nichols v. Eaton, 91 U. S. 716. The question, so far as we are advised, is a new one in this court, and in view of the respectable authority to be found on either side of it, we feel at liberty to adopt that view which is nearest in accord with our convictions of right and a sound public policy.

That is was the intention of the testator to place the net income of the property beyond the control of his daughter and her creditors while in the hands of the trustee, is manifest, and we perceive no good reason, nor has any been suggested, why this intention should not be given effect. We fully recognize the general proposition that one can not make an absolute gift or other disposition of property, particularly an estate in fee, and yet at the same time impose such restrictions and limitations upon its use and enjoyment as to defeat the object of the gift itself, for that would be, in effect, to give and not to give in the same breath. Nor do we at all question the general principle that upon the absolute transfer of an estate, the grantor cannot, by any restriction or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. If, for instance, upon the transfer of an estate in fee, the conveyance should provide that the estate thereby conveyed should not be subject to dower or to curtesy, or that it should not descend to the heirs general of the grantee upon his dying intestate, or that the grantee should have no power of disposition over it, the provision, in either or these cases, would clearly be inoperative and void, because the act or thing forbidden is a right or incident which the law annexes to every estate in fee simple, and to give effect to such provisions would be simply permitting individuals to abrogate and annul the law of the State by mere private contract.

This can not be done. But while this unquestionably is true, it does not necessarily follow that a father may not, by will or otherwise, make such reasonable disposition of his property, when not required to meet any duty or obligation of his own, as will effectually secure to his child a competent support for life, and the most appropriate, if not the only, way of accomplishing such an object is through the medium of a trust. Yet a trust, however carefully guarded otherwise, would in many cases fall far short of the object of its creation, if the father, in such case, has no power to provide against the schemes of designing persons, as well as the improvidence of the child itself. If the beneficiary may anticipate the income, or absolutely sell or otherwise dispose of the equitable interest, it is evident the whole object of the settlor is liable to be defeated. If, on the other hand, the author of the trust may say, as was done in this case, the net accumulations of the fund shall be paid only into the hands of the beneficiary, then it is clear the object of the trust can never be wholly defeated. Whatever the reverses of fortune may be, the child is provided for, and is effectually placed beyond the reach of unprincipled schemers and sharpers.

The tendency of present legislation is to soften and ameliorate, as far as practicable, the hardships and privations that follow in the wake of poverty and financial disaster. The courts of the country, in the same liberal spirit, have almost uniformly given full effect to such legislation. The practical results of this tendency, we think, upon the whole, have been beneficial, and we are not inclined to render a decision in this case which may be regarded as a retrograde movement. The creditors of the daughter have no ground to complain that they have been misled or wronged in consequence of the provision made for her by her father. It was his own bounty, and so far as they are concerned he had the right to dispose of it as he pleased. The property was not placed in her possession so that she might appear as owner when she was not, and thereby obtain credit. An examination of the public records would have shown that she had no power to sell or assign her equitable interest,—that the extent of her right was to receive the net accumulations of the trust estate from the hands of the trustee, and that these accumulations did not become absolutely hers, so as to render them subject to legal process for her debts, until actually paid to her. . . .

## BUSHONG v. TAYLOR.

(Supreme Court of Missouri, 1884, 82 Mo. 660.)

SHERWOOD, J. This was a proceeding in equity and *in rem.* Its object was to subject certain church property of the Methodist Episcopal Church to the payment of a sum of money which became due to the plaintiff, because of a loan made by him to the trustees of that church, for which loan a note was executed by the trustees to plaintiff for $1,250, and a like note to Newkirk, and the board of trustees, also, ordered that a mortgage on the church property be executed for the purpose of securing these notes, but the mortgage was never made. The plaintiff was successful in the trial court in subjecting the church property to the payment of his debt. . . .

Now as to the method of procedure for enforcing the obligation created by the trustees of the church. We are of opinion that the trustees were the only necessary parties defendant. They were selected by the association to hold and manage the property for the sake of convenience, and there is no necessity to look beyond them. . . .

The trustees were empowered by those terms to mortgage or sell church property in discharge of debts for which they had become responsible. They have failed to perform their duty in this regard to the plaintiff, and the arm of the court of equity is not too short to reach them and compel a performance of that duty. Indeed, it may be taken for granted that plaintiffs incurred the debt for the benefit of the society and with their approval relying upon the assurances contained in the book of discipline, and on the promise made by the trustees that a mortgage should be executed to secure the debt. Linn v. Carson, 32 Gratt. 170, sustains this position. And it is immaterial that in that case the plaintiff was one of the trustees of the church; for the plaintiff here was a surety for the trustees, and they being entitled under the terms of the discipline to a mortgage on, or sale of, the property, concerning which the debt was incurred, he will on the plainest and most familiar principles be entitled to be subrogated to all their rights and remedies. 1 Story Eq. Jur., §§ 499, 499c, 502; Furnold v. Bank, 44 Mo. 336. The trustees being entitled to mortgage or to sell the property, and refusing to do their duty, equity will afford

relief by decreeing that to be done which affords the adequate remedy. . . .

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## CITY OF ST. LOUIS v. KEANE.

(Missouri Court of Appeals, 1887, 27 Mo. App. 642.)

ROMBAUER, J. Under date of April 28, 1884, the city of St. Louis entered into a written contract with John C. Murphy as principal, and the interpleader, William Keane, as one of his sureties, whereby the latter covenanted to construct Gingrass sewer in part, and the city agreed to pay Murphy, for the work and materials, certain specified prices. . . .

The court found that William Keane had a judgment demand against Murphy for $834.00 for money advanced towards the construction of the sewer; that Thaddeus Smith had a demand of $793.71, on open account, for materials furnished to Murphy for the same purpose, and that Thorne & Hunkins had a demand of $117.00 on open account, for materials furnished in like manner. Concerning these facts, there was no controversy.

The court further found, and its finding is well supported by the evidence, that Murphy made an assignment of so much of the fund in the hands of the city as would satisfy the claim of Keane to the latter, to which assignment the city never assented. Whereupon, Keane brought a suit in equity against the city, to subject the funds in its hands to his claim against Murphy; and that a similar action was subsequently brought by Smith.

Upon the facts so found, which are partly conceded, and partly established by evidence, the court decreed that the fund in court be distributed among the three claimants in proportion to the amount of their respective claims, after first deducting the costs of the interpleader proceedings.

From this decree all the interpleaders appeal. Keane claims that, under the evidence, he is entitled to the entire fund, and Smith and Thorne & Hunkins claim that he is entitled to no part thereof, but that the fund should be divided between them in proportion to the amount of their respective claims, and that Keane should be adjudged to pay the costs of the interpleader proceedings.

The court evidently based its decision on the well-settled proposition announced in Heiman v. Fisher (11 Mo. App. 275), that, when assets are brought into a court of equity for distribution, they must be distributed between all the creditors *pari passu,* regardless of the diligence which any of them may have exercised in bringing the fund into court. In this, however, the court ignored a proposition equally well settled, that such disposition is to be made only when neither party has a superior equity or a prior lien on the specific fund. This court, in the case referred to, distinctly announces that, "when a judgment creditor has sued out execution which is returned *nulla bona,* if he file a bill to reach the equitable interest of his debtor, he may have, by his execution and legal diligence, a legal preference to the assistance of the court or a lien on the equitable interest."

In the case at bar, Keane obtained judgment against Murphy. He sued out an execution on such judgment, which was returned *nulla bona.* He thereupon instituted a suit against the city of St. Louis and Murphy to subject Murphy's funds in the city's possession to the lien of such execution by way of equitable garnishment. Such a proceeding was upheld in Pendleton v. Perkins (49 Mo. 569), and, if maintainable, it is not easy to discern how, on any principle applicable to equity proceedings, it would fail to confer on Keane a superior equity, entitling him to be first satisfied out of the fund in court, such fund being admittedly the fund which he had attached, unless the equities of the interpleading materialmen are superior to his.

The fund was charged with this lien before it was brought into court for distribution. In no view of the case, therefore, are the parties before the court entitled to a ratable distribution of the fund. Either the equities of Keane, as a lienor, are superior, as above stated, in which event he is entitled to be first satisfied out of the fund, or the equities of the materialmen are superior, in which event they are entitled to have their claim satisfied in preference to that of Keane; and, as the aggregate of their claims exceeds in amount the entire fund, Keane is entitled to nothing.

On a review of the evidence, we must hold that the last of these propositions is the only correct conclusion which can be reached. We can not see how this case can, on principle, be distinguished from the case of Luthy v. Woods (6 Mo. App. 67, 72), decided by this court, upon full consideration, on a second appeal. There, under a similar

clause in a contract, and under almost identical circumstances, it was held that the equities of the interpleading materialmen arose from the terms of the contract, and the assent to such terms by all the parties, and that such equities were superior to those of a general creditor, who, as in the case at bar, endeavored to secure a priority on the fund by equitable garnishment.

Our opinion as to the correctness of this conclusion is materially aided by the fact that Keane was a party to the contract, that he expressly assented to all its terms, and that he was well aware, when he tried to subject this fund to the payment of his claim, that the city had retained it under the terms of the contract, presumably for the security of the materialmen. . . .

It results from the foregoing that the judgment rendered can not be supported on the evidence. All the judges concurring, it is ordered that the judgment be reversed and the cause be remanded to the trial court, with directions to enter a decree distributing the fund in court ratably between the interpleaders Smith and Thorne & Hunkins, in proportion to their respective claims, after first deducting all costs accrued prior to the filing of any interpleas in the case, and, as to all subsequent costs, to render judgment against the interpleader Keane.

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## MOORE v. McFALL.

(Appellate Court of Illinois, 1913, 183 Ill. App. 628.)

Thompson, J. John J. St. Clair died testate in Benton, Franklin county, Illinois, on December 22, 1880.

This suit arises out of a dispute as to what was the intention and what should be the construction placed on the language used in his will. The controverted part of the will is as follows: "It is my will and desire that my business, hardware, furniture, tin shop and business as transacted by me be continued, and for this purpose and the care and education of my children having confidence in my wife, Rebecca St. Clair, I will and bequeath to said Rebecca St. Clair, my wife all my real and personal property of whatsoever kind, all title and interest therein, and for the purpose of paying my just debts and

education and support of herself and my family, I hereby authorize her, if necessary to sell and dispose of any of said property and real estate without any order or decree of Court, and that she pay all debts that may be just without the intervention of Courts and do and perform all things whatsoever in regard to my property for the purpose of carrying out this will as I might lawfully do. . . .

I desire my business carried on in the name of St. Clair Brothers and authorize and empower my Executrix to execute deeds of conveyance to property she may desire to sell." . . .

It appears that after the death of John J. St. Clair, the widow formed a partnership with her sons, Charles and Guy, and carried on the business in the name of St. Clair Brothers, for the benefit of the family under the supposed authority given her in the will. The business was thus conducted until some time in the year of 1897, when the business having become unprofitable the partnership was dissolved. The testator was in debt about $20,000 when he died.

While the business was being conducted by the said widow and sons, and in order to carry on said business, the widow and her said sons borrowed money from appellees, and when the business was suspended in 1897 there was owing to appellee Cantrell, for money borrowed by the partnership and used in the business, $1,000 and interest. This indebtedness was evidenced by a judgment note, and Cantrell took judgment by confession, on September 27, 1897, for $1,196.50, against all of said partners. Cantrell assigned said judgment to one Ammon, and afterwards repurchased said judgment and by revivor proceedings and issuing execution thereon kept the same alive and seeks in this proceedings to have the same declared a lien on the real estate above described. . . .

The rights of the parties are conceded to rest upon the construction of the will, and such equities as flow from the attempt of the widow to carry out its provision. The testator had a family of nine children and a wife. Only one of his children was of age when he executed his will. Eight minor children and his wife were to be considered. Their support and education was the thing that concerned him, and he sought by his will to make provision to accomplish that purpose. He directed his wife to continue the business he was engaged in as a means to that end. He placed the whole of his estate in the hands of his wife with specific directions to use it in caring for and educating his children. With expressed confidence in his wife, he gave her all he had without

reserve to pay his debts, to carry on the business, and support and educate their children. She accepted the trust and made an honest effort to carry out the expressed wish and will of her deceased husband. She kept the family together and supported and educated the children during their minority. The business was conducted under the name of St. Clair Brothers, as requested by the will. She associated her two eldest sons in the business with her, and while there was no positive requirement of the will so to do, the intimation was strongly that way, when the testator designated "St. Clair Brothers" as the name under which the business was to continue. The business ran along for about seventeen years, but finally became so unprofitable that it had to be suspended altogether, and when closed up the two debts forming the basis of the two judgments of appellees remained unsatisfied.

The main point relied upon by appellants, as error, is the construction given to the will, that the whole of the testator's property was involved in the trust, appellants claiming that only the property embarked in the business at the time of the testator's death was authorized by the will to be used in continuing the business.

A testator may appoint a trustee to continue a business conducted by him at the time of his decease, and may direct what portion of his property is to be used. He may also impress the whole of his estate with the burdens of continuing such business. The intention of the testator as to what part or how much of his estate is to be devoted to such enterprise must be gathered from the language employed in the instrument creating the trust. The intention must be found in the will itself, and when found must, if possible, be given effect. . . .

A careful reading of this will forced the conclusion that the testator intended to place without reserve all of his property in the hands of his wife to be used for the support of herself and for the support and education of his children, coupling therewith a positive direction that she should continue the business. All his assets, special and general, were pledged to the business under the evident hope that the income would meet the requirements of the family and procure the benefits for them according to his expressed wish. The residuary clause strengthens this view. It was all trust property.

A court of equity will lay hold on any property so placed in the hands of a trustee, to satisfy an honest debt created in the execution of an express trust. The evidence shows that both these sums of

money were borrowed to carry on the business, and were used for that purpose. No rule of law has been pointed out which prohibits the application of equitable principles. It would be inequitable to defeat appellees' claims and the decree of the trial court will be affirmed.

Affirmed.

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## N. J. TITLE GUARANTEE & TRUST CO. v. PARKER.

(New Jersey Court of Chancery, 1915, 84 N. J. Eq. 351, 93 Atl. 196.)

HOWELL, V. C. The essential difference between the two instruments above recited lies in the final destination of the fund of which Mr. and Mrs. Parker were life tenants. The earlier document provides for its distribution in accordance with Mr. Parker's last will and testament, or, if he should die intestate, for its distribution among such persons as would be entitled to receive the same under the intestate laws of New York if he had died intestate and a citizen and resident of that state. It is obvious that in case it should be found that the instrument of 1903 is valid and is subsisting, the whole of the estate in question is disposed of thereby, and that in that case there is nothing left for the second instrument to operate on. It therefore becomes necessary at the outset to determine upon the validity of the earlier instrument. If that is irrevocable, as by its terms it purports to be, and is still in force, then and in such case the distribution of the fund must be in accordance with its provisions.

The general rule is that a completed trust, without reservation of power of revocation, can only be revoked by consent of all the cestuis; and that even a voluntary trust for the benefit wholly or partly of some person or persons other than the grantor if once perfectly created and the relation of trustee and *cestui que trust* is once established, will be enforced, though the settlor has destroyed the deed or has attempted to revoke it by making a second voluntary settlement of the same property, or otherwise, or if the estate by some accident afterwards becomes revested in the settlor. Perry, Trusts, § 104. This is the undoubted rule in New Jersey. Isham v. Delaware, Lackawanna and Western Railroad Co., 11 N. J. Eq. 227. There Thomas G. Trumbull conveyed land to his father, John M. Trumbull, in trust, to be leased

until April 1st, 1840, the rents being payable to Thomas's two sisters, and after that date to be sold for the highest price they would bring, the proceeds to be invested, the interest paid to said sisters during life, and to their children after death, until the youngest child should be twenty-one, and then the principal to be paid to the said children in equal parts *per capita*. In 1836 the two sisters joined with the trustee, their father, in reconveying the lands to the original grantor. It was held that the conveyance did not transfer the legal title to the original grantor. In Gulick v. Gulick, 39 N. J. Eq. 401, the husband conveyed lands to his wife, she to hold the same in trust for his benefit during his lifetime, and at his death to sell the same and divide the proceeds between his widow, if living, and their children or grandchildren. It was held that this was a trust which must be maintained inviolate, and that the husband and wife could not substitute another trust in relation to the same lands in such a manner as to affect the interests of the children and grandchildren. . . .

When, therefore, Mr. Parker executed the original instrument he created a life estate in himself, with remainder to such persons as he should by his last will appoint, and in default of such appointment, to his heirs-at-law and next of kin under the intestate laws of the State of New York, and having executed a last will, in pursuance of the power and reservation contained in the trust deed, by which he gave the residuum of his estate, including the trust fund in question, to the children of his brother, he thereby created remaindermen who, under the provisions of the trust instrument, become entitled, under the rules of law above stated, to the capital of the fund. Having thus irrevocably disposed of the remainder, he could make no further or other disposition of it without the consent of the remaindermen whom he had so created, and, inasmuch as such consent cannot be had, the fund goes irrevocably to them. . . .

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## KEYES v. CARLETON.

(Supreme Court of Massachusetts, 1886, 141 Mass. 45, 6 N. E. 524.)

Bill in equity, filed April 17, 1884, to have a trust created by the plaintiff, by a certain deed to the defendants William E. Carleton and

Charles E. Abbott, as trustees, declared null and void, and that the trustees be ordered to account for and pay over to the plaintiff the whole of the trust fund.

By the deed, a copy of which was annexed to the bill, the plaintiff, in consideration of five dollars to her paid by Carleton and Abbott, and "the natural love and affection she bears for her children," conveyed to Carleton and Abbott a certain parcel of land in Denver, Colorado, upon the following trusts: "To manage, let, and take care of, to collect and receive the rents, increase, uses, issues, and profits thereof, to pay over and account for the same to the said Mary E. Keyes, or for her use, during her life, and after her decease to pay over and account for the same to her children, or for their use. To sell and convey the same in fee simple at their direction, discharged of all trusts, and at any time after the decease of the said Mary E. Keyes, if they shall see fit and proper, but only in such case, to convey the same to the children or next of kin of the said Mary E. Keyes, and in case it shall not be so conveyed during the lifetime of the said children, then to convey the same to their issue." . . .

The bill alleged that the plaintiff's intention in signing the deed was to place her real estate in such position and condition that her husband could not have any control over it in her lifetime; and that, if she should die before her husband, it should go to her children; that, at the time of signing the deed, she was greatly disturbed in mind, and did not understand the full effect of the deed; that she supposed, in case of her husband's death before hers, the estate would be reconveyed to her discharged of trusts; and that she executed the deed under an entire mistake and misapprehension of its force and effect, as bearing upon her rights in case her husband died before her. . . .

MORTON, C. J. It is settled by the uniform course of the decisions in this Commonwealth that a voluntary settlement, fully executed by a person of sound mind, without any mistake, fraud or undue influence, is binding upon the settler, and cannot be revoked, except so far as a power of revocation has been reserved in the deed. Viney v. Abbott, 109 Mass. 300; Sewall v. Roberts, 115 Mass. 262, and cases cited.

In the case before us, the plaintiff, acting deliberately and under the advice of counsel, executed the deed of settlement, and there is no pretence of any fraud, collusion, or undue influence. The deed con-

tains no power of revocation, and it is clear that the power of revocation was intentionally omitted. As first drafted, the deed created a dry trust in favor of the settler, which probably could have been revoked by her at any time. But if she had retained a power of revocation, it would have defeated one of the principal objects of the settlement, which was to protect her from the threats, or importunities, or influence of her husband, and therefore the deed was altered to its present form. Both parties understood that she was not to have the power to revoke it. It is not, therefore, a case like some of those cited by the plaintiff, where both parties supposed the settlement to be revocable, and the power to revoke was omitted by mistake. See Aylsworth v. Whitcomb, 12 R. I. 298; Garnsey v. Mundy, 9 C. E. Green, 243, and cases cited.

The justice who heard this case has found that no fraud or imposition was practiced on her; that the deed was carefully read over to her; that there was no mistake, in the sense that she thought the deed contained any other or different provision than in fact it contained, and no accident, in the sense that anything was omitted which was intended to be put in; and also that the contingency of her surviving her husband was not in her mind or in that of her advisers, and, if it had been, there was no means of determining what the provision, if any, would have been. From these findings, it is clear that there was no mistake, in the sense that she wrongly apprehended the contents of the deed. The most that can be said is, that she did not, at the time she executed the deed, anticipate or have in her mind what would be the legal effect in the contingency of her husband's dying before her. She did not, at the time, think of this contingency, but this is not a mistake which will justify setting aside a settlement, especially when it is not shown that, if this contingency had been in her mind, she would have made a deed in any respect different. But this was not a purely voluntary settlement. It appears that she was in financial difficulties and in present need of money, and that her brother advanced her, by way of loan, $600, as a part of the transaction, and the condition that she would execute this deed of trust. It seems to have been a family arrangement to save her property for the benefit of her children, and to protect it, not only from the demands of her husband, but possibly from her own improvidence.

It may be that the fact that there was this pecuniary consideration would not prevent a court of equity from setting aside the settlement,

upon proof of fraud or concealment, or upon proof of any material misapprehension on her part of facts which, if known and called to her attention, would have led to a settlement of a different character. But it throws some light upon the transaction, and tends to show that her failure to think of the contingency of her husband's death was immaterial, and that, if she had thought of it, there would have been no change in the provisions of the deed. We are of opinion that the plaintiff does not show sufficient cause for setting aside the settlement, voluntarily and fairly made by her.

Bill dismissed.

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## EDWARDS v. WELTON.

(Supreme Court of Missouri, (1857) 25 Mo. 378.)

SCOTT, J. This is an attempt, by an action in the nature of trover, to execute a constructive trust. The prayer of the petition is for the possession and delivery of the slave, and in default of delivery, a judgment for his value and his hire. . . .

It is obvious that this action has been misconceived, or at least that the plaintiffs have misconceived their rights, and have instituted their action in such a way as will not secure the adjustment of the trust by one suit. The trust is a joint one. One of its beneficiaries has no sole or exclusive right to any particular part or subject of the trust. Each beneficiary has a right in every part; and this is the first instance which has fallen under our notice in which one of several joint *cestuis que trust* has been permitted to single out one part of the trust fund, assert an exclusive right to it, and enforce that right by an action in the nature of trover. There is nothing whatever in the record which shows that this proceeding has any sanction in the approbation of the other parties who are interested. The instructions, given at the instance of the defendants, other than Solomon Welton, do not help the matter. According to their own showing the plaintiffs were not entitled to more than one-fifth of the value and hire of the slaves in controversy. This fifth would be exclusive of the interest to which they have a right as one of the heirs of the mother and sister. As the plaintiffs have been excluded from all participation in a joint trust in which they have an

interest, it is obvious that their rights can only be enforced in an action in which the whole trust fund is sought to be adjusted. The other *cestuis que trust* being made defendants, the portions they have received on the taking of an account before a commissioner would be taken into consideration, and the entire property divided or sold so as to do full justice between the parties. The parties who are *sui juris* may arrange matters by consent, but that consent, to avoid future litigation should be made apparent by the record. . . .

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## WAGNER v. WAGNER.

(Supreme Court of Illinois, 1910, 244 Ill. 101, 91 N. E. 55.)

This was a bill filed by appellant for the construction of the will, and first codicil thereto, of his father, George Wagner, deceased. . .

Farmer, C. J. . . . The first codicil, the validity of which is the only question before us for decision, recites that since the making of the original will the testator had converted most of his estate into personal property, and that it was largely represented by shares of stock in the Rock Island Brewing Company, to the building up of which industry he had devoted many years of his life. He expressed the desire and wish that as far as possible his holdings in the brewing company be kept intact by his sons after his death. He then devised and bequeathed to his executors and trustees one-third of his holdings in the Rock Island Brewing Company stock in trust for the benefit of his son Ernst Wagner, appellant, first deducting from the interest held for the benefit of George Wagner such portion of the $5000 bequeathed by the original will to his children as might be necessary to pay the same. The remaining one-third of the testator's Rock Island Brewing Company stock was bequeathed to his son Robert A. Wagner absolutely, to be his forever. The codicil directs the trustees to pay to the testator's sons Ernst and George Wagner the net income derived from the Rock Island Brewing Company stock in such amounts and at such times as in their discretion they shall deem proper, and they are authorized for the support and maintenance of either of said sons, or if for any other purpose they deem it advisable, to pay the said sons any sum greater than the annual net income from said stock, and, if necessary to raise such additional sums, the trustees are given

authority to mortgage, pledge, or sell any portion of the stock. The trustees are requested by the codicil to administer the trusts and deal with the sons Ernst and George as nearly as possibly as the testator would do if living, "keeping in mind, however, my expressed desire to have the Wagner interests remain identified with the Rock Island Brewing Company, as far as practicable. The trusts hereby created shall terminate in the discretion of the trustees or their successors." . . .

We are of opinion, under the authority of the case above cited in this State, and the weight of the current authority in other States, the trust created by the codicil is a valid spendthrift trust. We are also of opinion that, even if the trust created by the codicil should be held invalid as a spendthrift trust, it would be valid as a gift to the sons not to take effect in possession until a future day, namely, the termination of the trust. We are aware that there are respectable authorities holding the contrary and a number of such authorities are cited in appellant's brief, but such trusts are sustained in this State and many others when not in violation of the rule against perpetuities. In Rhoads v. Rhoads, 43 Ill. 239, the testator devised his estate to the executors in trust for his children, with directions and authority to invest the proceeds of the estate in government bonds, and at the expiration of fifteen years after his death to distribute the estate with its accumulations, $10,000 to his wife and the remainder equally among his children. The court, after reviewing the English authorities holding to the contrary held that the postponement of the enjoyment of the gift did not invalidate it and sustained the will.

In Claflin v. Claflin, 149 Mass. 19, (20 N. E. Rep. 454,) the will under consideration gave one-third of the residue of the testator's personal estate to trustees for the benefit of a son and directed its payment to him, $10,000 when he reached the age of twenty-one years, $10,000 when he reached the age of twenty-five years and the balance when he reached the age of thirty years. After he had attained the age of twenty-one years and had been paid $10,000, but before he was twenty-five years of age, he filed a bill to compel the trustees to pay him the remainder of the trust fund. His contention was that the provisions of the will postponing payment beyond the time when he arrived at twenty-one years of age were void. The court said: "There is no doubt that his interest in the trust fund is vested and absolute and

that no other person has any interest in it, and the authority is undisputed that the provisions postponing payment to him until some time after he reaches the age of twenty-one years would be treated as void by those courts which hold that restrictions against alienation of absolute interests in the income of trust property are void. There has, indeed, been no decision of this question in England by the House of Lords and but one by a chancellor, but there are several decisions to this effect by masters of the rolls and by vice-chancellors. (Citing numerous authorities.) These decisions do not proceed on the ground that it was the intention of the testator that the property should be conveyed to the beneficiary on his reaching the age of twenty-one years, because in each case it was clear that such was not his intention, but on the ground that the direction to withhold the possession of the property from the beneficiary after he reached his majority was inconsistent with the absolute rights of property given him by the will. This court has ordered trust property conveyed by the trustee to the beneficiary when there was a dry trust, or when the purposes of the trust had been accomplished, or when no good reason was shown why the trust should continue and all the persons interested in it were *sui juris* and desired that it be terminated; but we have found no expression of any opinion in our Reports that provisions requiring a trustee to hold and manage the trust property until the beneficiary reached an age beyond that of twenty-one years are void if the interest of the beneficiary is vested and absolute. . . . It is plainly his will that neither the income nor any part of the principal should now be paid to the plaintiff. It is true that the plaintiff's interest is alienable by him and can be taken by his creditors to pay his debts, but it does not follow because the testator has not imposed all possible restrictions that the restrictions which he has imposed should not be carried into effect. . . . The strict execution of the trust has not become impossible. The restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make. Other provisions for the plaintiff are contained in the will apparently sufficient for his support, and we see no good reason why the intention of the testator should not be carried out." Rhoads v. Rhoads, *supra,* was cited in support of this decision.

Gifts to trustees for the benefit of persons who are objects of the testator's bounty but postponing their enjoyment in possession to a

future day, properly limited as to time, have been sustained in Lunt v. Lunt, 108 Ill. 307, Flanner v. Fellows, 206 id. 136, Howe v. Hodge 152 id. 252, Pearson v. Hanson 230 id. 610, and Armstrong v. Barber, 239 id. 389. The principle of these decisions appears to be that the equitable title vests in the beneficiaries immediately upon the death of the testator, that such trusts are not in restraint of aliénation, and that the rule against perpetuities is not violated where the time to which the enjoyment in possession is postponed is properly limited by the will.

Kales on Future Interests, in the chapter on "Restraints on Alienation," discusses Claflin v. Claflin and other cases above cited, and reaches the conclusion that where Steib v. Whitehead, supra, is recognized as law, Claflin v. Claflin and Lunt v. Lunt will be followed, and the postponed enjoyment of an equitable interest, properly limited as to its duration in time, will be held valid. In section 294 the author discusses some of the reasons given by Prof. Gray and Lord Langdale why postponed enjoyment should be held invalid, and says they are chiefly that such provisions are unwise. Discussing this subject the author says: "The worst charge that can be made against holding these postponed enjoyment clauses valid seems to be that they are either harmless, or in an extreme case, viz., where the *cestui* is a spendthrift and insists on selling his equitable interest for cash, unwise. To defeat the testator's intention wholly upon so trivial a ground ought not to be thought of. The attitude of the court in Claflin v. Claflin is in favor of carrying out the settlor's intention, and the result reached is, it is submitted, sound."

We are of opinion the decree of the circuit court was right, and the judgment of the Appellate Court affirming that decree is affirmed.

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## WYLIE v. BUSHNELL.

(Supreme Court of Illinois, 1917, 277 Ill. 484, 115 N. E. 618.)

Carter, J. . . . Of course, there can be no question as to the duty of a trustee to keep regular and accurate accounts during the whole course of his trusteeship, from which it can be ascertained what property has come into his hands, what has passed out and what re-

mains therein, including all receipts and disbursements in cash, and the sources from which they came, to whom paid and for what purpose paid. (Warner v. Mettler, supra; Lehman v. Rothbarth, 159 Ill. 270; 3 Pomeroy's Eq. Jur. —3d. ed. sec. 1063; 2 Perry on Trusts, —6th ed. —sec. 821; 2 Beach on Trusts and Trustees, sec. 682.) And these same authorities hold that these accounts should be open at all times to the inspection, on demand, of the beneficiary. No special form, however, of keeping books is required. The question of their competency and sufficiency must be determined by the appearance and character of the accounts, regard being had to the character of the work and the qualifications ordinarily required in keeping books of account as to such business. Separate scraps of paper have been admitted in evidence as books when sworn to as such. A notched stick has been held to be admissible as a book of original entries where the accuracy of the entries was satisfactorily tested by a comparsion with an account made out from notched sticks some time previous. Sheets from a loose-leaf ledger system of account containing the original entries are, when properly identified, admissible in evidence. (10 R. C. L. 1178; Reyburn v. Queen City Saving Bank and Trust Co. 171 Fed. Rep. 609; Bell v. McLeran, 3 Vt. 185; Presley Co. v. Illinois Central Railroad Co. 120 Minn. 295; Packing Co. v. Storage Co. 41 Utah, 92; Ricker v. Davis, 160 Iowa, 37.) The material, form or construction of the book offered in evidence as a book of original entries is unimportant. (9 Am. & Eng. Ency. of Law, —2d ed. — sec. 917; State v. Stephenson, 2 Ann. Cas. (Kan.) 841, and cases cited in note.) The manner of keeping the accounts is the important consideration. If they are in such form and so preserved as to fairly show the true state of the accounts between the parties, and can, under the rules governing the making of such entries, be fairly held to be original entries, that is all that is required. To hold that they must be in bound book form in all cases is giving more importance to form than to substance. The vital question in such cases is whether the entries offered are in the original charges, are true and have been made at or about the time of the transaction. (Graham v. Work, 141 N. W. Rep. (Iowa) 428; United Grocery Co. v. Dannelly, Ann. Cas. 1914d (S. C.) 489, and cases cited in note.) Books consisting of entries for the time or workmen are admissible in evidence though the entries were made from time-slips made out by the workmen and approved by the foreman.

(Chisholm v. Beman Machine Co. 160 Ill. 101.) "Stack sheets" which recorded the number of tons of straw in stacks, made out from scale tickets, are admissible as original entries. Chicago and Alton Railroad Co. v. American Strawboard Co. 190 Ill. 268.

The testimony of plaintiff in error as to his method of keeping accounts was, substantially, that he had a system of keeping folders or large envelopes about twenty-four inches long by eighteen or twenty inches wide, and in them he inserted and kept all the papers as they came into his possession, each year's business separate and kept in a separate folder; that from time to time he made distributions, and in making computations for these distributions he consulted these folders and exhibits and memoranda and papers, in connection with his bank book; that there were no transactions performed by him as trustee or executor for which he did not have vouchers or receipts; that while he had kept a system of accounts in a bound book since the filing of the original bill in this case he had not done so before, as he considered his system of keeping accounts in a separate folder for each year's transactions was fully as accurate, in connection with his pass-book, in which he made all deposits of money, that he received as trustee or as executor; that he considered, before he began the plan of keeping his accounts in a bound book, that he had a system of keeping accounts in these folders in which all the original receipts, vouchers, correspondence and everything relating to the transaction of the business of that year were kept. . . .

Nothing is called to our attention in this record to justify the removal of plaintiff in error as trustee. If his final reports as executor and as trustee, as they now stand, are correct and show with reasonable certainly that the estate has not lost any money, we do not think the fact, alone, that he has been possibly somewhat careless in his method of keeping the accounts would justify his removal as trustee.

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## TILLINGHAST v. MERRILL.

(New York Court of Appeals, 1896, 151 N. Y. 135, 45 N. E. 375.)

BARTLETT, J. The defendant Merrill, while supervisor of the town of Stockbridge, in the county of Madison, deposited with a firm of

private bankers to his credit, as supervisor, certain of the public moneys in his hands; the banking firm afterwards failed and the money was totally lost. This action was brought by the county treasurer to recover the money of Merrill and his bondsmen, upon the theory that Merrill on receiving the money became the debtor of the county, and that the deposit of the same was at his own risk.

The trial judge found that Merrill acted in good faith and without negligence in all that he did in the premises.

Under these circumstances the learned counsel for the defendants has urged, with much earnestness and ability, that a supervisor rests under the common-law liability whereby he was bound to exercise good faith and reasonable diligence in the discharge of his duties, and is not responsible for any loss of money which came to his official custody, occurring without fault on his part; that proof of the failure of the banking firm, where he had deposited the money in good faith and without negligence, is a complete defense to this action. . . .

It, therefore, comes to this, that for forty-five years the case of Supervisors v. Dorr (25 Wend. 440) has stood without being directly overruled by any case in this state, and the rule of the limited liability of the common law approved therein by four of our most distinguished judges.

It must be admitted, however, that the weight of authority in the Federal and State courts is in favor of holding officials having the custody of public moneys liable for its loss, although accruing without their fault or negligence. In many of these cases the decision turned upon the construction of the local statute of the official bond, but others squarely decide the question on principles of public policy.

In the case at bar, the defendant Merrill is sought to be held liable for school moneys paid to him by the county treasurer to disburse in payment of the salaries of school teachers upon the orders of the trustees. The statute imposing this duty reads as follows, viz:

"It is the duty of every supervisor,

"1. To disburse the school moneys in his hands applicable to the payment of teachers' wages upon and only upon the written order of a sole trustee, or a majority of the trustees, in favor of qualified teachers. . . ." (2 R. S. (8th ed.) page 1283, section 6.)

By paragraph 8 of the same section a supervisor is required to pay to his successor all school moneys remaining in his hands.

In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse and justly account for the same does not add to the liability created by statute.

As before intimated, we must consider and decide this question upon general principles and in the light of public policy.

In the case of an officer disbursing the public moneys much may be said in favor of limiting his liability where he acts in good faith and without negligence, and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care and engaged in the conscientious discharge of duty. When considering this side of the case it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law which exacted proof of misconduct or neglect.

It is at this point, however, that the question of public policy presents, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents.

Without regard to decisions outside of our own jurisdiction we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability which requires a public official to assume all risks of loss and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States Supreme Court, in United States v. Thomas, (15 Wallace, 337) held the surveyor of customs for the port of Nashville, Tennessee, and depositary of public money at that place, not liable when prevented from responding by the act of God or the public enemy.

If that state of facts is hereafter presented to this court it will doubtless be carefully considered whether it does not present a proper exception to the general rule. . . .

The views we have expressed lead to a final judgment against the defendant Merrill as supervisor of the town of Stockbridge, although he is shown by this record to have discharged his official duties in an honorable and faithful manner. . . .

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## MATTER OF HALL.

(New York Court of Appeals, 1900, 164 N. Y. 196, 58 N. E. 11.)

Cullen, J. The question in the case is as to the liability of the appellants as trustees for an investment of twenty-five thousand dollars in the debenture stock of "The Umbrella Company." The authority given the appellants by the will is: "I hereby give my said executors and trustees hereinbefore named full power to reinvest the proceeds of such sale or other act as aforesaid in any security real or personal which they may deem for the benefit of my estate and calculated to carry out the intention of this my last will." The testator himself had been in the umbrella business, and by the sixth clause of his will he directed that his interest in the business be closed on the first day of July or the first of January immediately following his decease. The referee acquitted the appellants of any bad faith, but held them liable on the ground that the character of the investment was illegal. This report was confirmed by the surrogate and the surrogate's decree unanimously affirmed by the Appellate Division, which, while it held that under the will the trustees were not limited to what might be called ordinary trust investments, was of opinion that the investment was speculative and hazardous, and therefore, improper. With this view we agree. As there was a unanimous affirmance below, unless we are prepared to decide that good faith exonerates the trustees from liability, no matter how speculative, hazardous or unwise the investment may have been, we must affirm the judgment and cannot look into the evidence to see how speculative or unreasonable the investment was.

The investment in the case at bar was in the preferred stock of a corporation organized to conduct the manufacture and sale of umbrellas, and formed by the consolidation of several firms at the time engaged in that business. The corporation had no real estate or plant. The preferred or debenture stock was issued for merchandise, fix-

tures and book accounts of the firms, while the common stock was issued for the supposed good will of those firms. While the money was not paid on an original suscription of stock, but the stock was bought from a holder, still it was during the very first days of the existence of the company and before experience had shown that it could achieve any success or stability. After doing business for a short time the corporation failed and two-thirds of the investment of twenty-five thousand dollars was lost. One of the firms from the consolidation of which the corporation sprang was that of the appellant Hall, in which firm the testator at the time of his decease was a partner. As pointed out in the opinion delivered by Justice Bartlett in the Appellate Division the testator certainly never inended that the money he had directed to be withdrawn from the business should be invested in the same business.

We concede that under the terms of the will the trustees were given a discretion as to the character of the investments they might make, and that they were not limited to the investments required by a court of equity in the absence of any directions from a testator. The trusts of this will are to provide the testator's children with incomes during their lives, and on their deaths the principal it to go to their issue. The very object of the creation of trust, was, therefore, the security of the principal, otherwise the testator might better have given the property outright to his children who were the primary objects of his bounty. The range of so-called "legal securities" for the investment of trust funds is so narrow in this state that a testator may well be disposed to grant to his executors or trustees greater liberty in placing the funds of the estate. But such a discretion in the absence of words in the will giving greater authority should not be held to authorize investment of the fund in new speculative or hazardous ventures. If the trustees had invested in the stock of a railroad, manufacturing, banking, or even business corporation, which, by its successful conduct for a long period of time, had achieved a standing in commercial circles and acquired the confidence of investors, their conduct would have been justified, although the investment proved unfortunate. But the distinction between such an investment and the one before us is very marked. Surely there is a mean between a government bond and the stock of an Alaska gold mine, and the fact that a trustee is not limited to the one does not authorize him to invest in the other.

In our judgment the authority given to the appellants by this will is quite similar to that vested in trustees in the New England states, where the strict English rule as to the investment of trust securities which prevails in this state does not obtain. In Mattocks v. Moulton (84 Maine, 545) it was held that in the investment of trust funds the trustee must exercise sound discretion as well as good faith and honest judgment. The court said: "It will be generally conceded that a mere business chance or prospect, however promising, is not a proper place for trust funds. While, of course, all investments, however carefully made, are more or less liable to depreciate and become worthless, experience has shown that certain classes of investments are peculiarly liable to such depreciation and loss. These, of course, would be avoided by every prudent man who is investing his own money with a view to permanency and security rather than the chance of profit. A trustee should, therefore, avoid them, even though he sincerely believes a particular investment of that class to be safe as well as profitable." In Dickinson, appellant (152 Mass. 184), a trustee was held liable for an investment in Union Pacific railroad stock. It was there said: "Our cases, however, show that trustees in this commonwealth are permitted to invest portions of trust funds in dividend paying stocks and interest-bearing bonds of private business corporations, when the corporations have acquired, by reason of the amount of their property, and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments."

Several of the equitable life tenants consented to the investment made by the trustees and are estopped from questioning its propriety. The courts below have so held and have authorized the trustees to retain the shares of such life tenants in the income produced by the sum which the appellants have been directed to pay into the fund on account of the loss on the securities. The decree, however, does not go far enough in this respect, for in certain contingencies these life tenants may be entitled to share in the principal of the fund. The decree should be modified so as to provide that in case any beneficiary who has assented to the investment in the umbrella stock should become entitled to any part of the principal of the fund paid by the trustees, then the trustees may retain such part, and as so modified affirmed, without costs of this appeal to any party.

## McCULLOUGH'S EXECUTORS v. McCULLOUGH.

(New Jersey Court of Chancery, 1888, 44 N. J. Eq. 313, 14 Atl. 642.)

On bill for instructions to trustees. . . .

THE CHANCELLOR. . . . They now ask to be instructed:

First, whether the several trust funds must be kept separately invested, and

Second, whether the investments may be upon mortgages on lands in Minnesota.

It appears by the statement of counsel that one of the *cestuis que trustent* resides in this state, and that all of them reside in states distant from Minnesota.

The first inquiry must, without hesitation, be answered in the affirmative. Each fund is a distinct trust for the benefit of distinct *cestuis que trustent*.

It must be kept separate from all other funds, so that every step in its management may be distinctly traceable in the accounts of the trustees and in the investments they make. The trust must not, through investment, be complicated with the rights of strangers, or required to share in the losses of other funds. 1 Perry on Trusts, § 463; Fowler v. Colt, 10 C. E. Gr. 202; S. C. 12 C. E. Gr. 492.

I am satisfied that the second question should be answered in the negative.

The courts of the state, within which a trustee must account, should hesitate to sanction an investment upon the security of lands that are not within their own jurisdiction, not merely because, in such case, they will be left without the proper facilities to obtain accurate and satisfactory information concerning the investment, but also because they will lose direct control of the fund itself.

Where the trustee is without the jurisdiction, it becomes more important that the fund should be within it, for otherwise the courts may find themselves stripped, not only of power to properly investigate the condition of the trust, but also of power to enforce their decrees.

Again, both the trustee and the *cestui que trust* are interested in the proper investment of the trust fund, the one because of the

duty and responsibility which rest upon him and the confidence that is reposed in him, and the other because of the beneficial value that proper security is to him.

In subserving these respective interests it is incumbent upon both the trustee and the *cestui que trust* to constantly watch the investment of the trust fund and be on the alert to protect it from harm.

To afford opportunity for this watchful care the funds should be invested within the convenient reach of both of these parties.

Judge Finch, of New York court of Appeals, in the case of Ormiston v. Olcott, 84 N. Y. 339, in commenting upon the mischief of permitting a trustee to invest trust funds in another state, says: "It would be unjust to the beneficiaries to compel them to accept such investments, and tend to increase the risk of ultimate loss. The proper and prudent knowledge of values would become more difficult and uncertain; watchfulness and personal care would in the main be replaced by confidence in distant agents, and legal remedies would have to be sought under the disadvantage of distance and before different and unfamiliar tribunals."

In the case under consideration the trustees reside and have the trust funds in a state distant from the residences of their cestuis que trustent. The continuance of such a condition of affairs must be condemned. If it remains, the happening of circumstances may readily be imagined that may not only put the beneficiaries of the trust to great annoyance, disadvantage and expense, but also render our courts powerless to do them material service. I cannot overlook the fact that among the numerous and small mortgages that are held by these trustees some may fail, and thereupon questions may arise whether the investments in them were made with requisite care and prudence, and necessitate inquiry into values and other particulars in the locality of the lands mortgaged, in which inquiry the trustees would have the manifest advantage, in a contest with their distant *cestuis que trustent*, of being able to produce evidence from familiar surroundings, at little expense, while their opponents would be obliged to seek for evidence among strangers, in a strange community, and possibly at an expense not at all commensurate with the injury for which they may desire redress. I do not think that the high rates of interest that are obtainable in Minnesota, or the convenience of the trustees, should influence me to disregard the dangers to which the beneficiaries may be

subjected. The fact that the testator made such investments will not justify the trustees in continuing them. His position as owner of the funds in his own right, was vastly different from the position of confidence and responsibility which the trustees occupy. The will gives no express authority for the investments as they are made, and I fail to find such authority, in it, by necessary or reasonable implication.

The trust funds should be brought within this State, and invested here in securities approved by this court.

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## THAYER v. DEWEY.

(Supreme Court of Massachusetts, 1904, 185 Mass. 68, 69 N. E. 1074.)

KNOWLTON, C. J. The trustees in this case invested more than $200,000 in the purchase of real estate in Chicago, and the question is whether this investment shall be allowed in their account.

The rule in this Commonwealth governing trustees in making investments has often been stated and is well established. They are bound to act in good faith and to exercise a sound discretion. Harvard College v. Amory, 9 Pick. 446; Amory v. Green, 13 Allen, 413; Brown v. French, 125 Mass. 410; Bowker v. Pierce, 130 Mass. 262; Hunt, appellant, 141 Mass. 515; Dickinson, appellant, 152 Mass. 184; Pine v. White, 175 Mass. 585; Green v. Crapo, 181 Mass. 55.

The appellant contends that an investment in real estate outside of the Commonwealth should not be sustained unless, first, the trust funds are so invested when they come into custody of the trustee, in which case he may be justified in retaining the investment; second, the will authorizes or instructs the trustee to make such an investment; third, in certain rare and exceptional cases when such an investment may be necessary or required to protect or secure other investments or interests involved in the trust fund. The rule in some other States is substantially in accordance with this contention. Ormiston v. Olcott, 84 N. Y. 339; Rush's estate, 12 Penn. St. 375, 378; Ex parte Copeland, Rice Eq. (S. C.) 69; McCullough v. McCullough, 17 Stew. (N. J.) 313. But in these States trustees are limited more strictly in their power to make investments than they are limited by our rule in Massachusetts. In Amory v. Green, 13 Allen, 413, trustees were authoriz-

ed to invest in real estate for a homestead for the *cestui que trust* in another State, because the authority given by the will was broad enough to justify it. In many other cases investments in stock and bonds of great corporations organized and doing business in other States have been approved, where it appeared that the investment was made in good faith, and in the exercise of a sound discretion, according to the standard of other men of prudence, discretion and intelligence in the management of their own affairs in regard to the permanent disposition of their funds with a view to probable income as well as the probable safety of the capital to be invested. In these cases the stocks and bonds were such as are often sold, and have a recognized market value, away from the place where the corporation is established or where its property is located.

There is a grave objection to the investment of a trust fund in the purchase of real estate in a foreign State, where the property is beyond the jurisdiction of our courts and is subject to laws different from our own. On this account is would not be within the exercise of a sound discretion to make such an investment without some good reason to justify the choice of it. Ordinarily it is very desirable that investments which have a local character, like the ownership of real estate, should be within the jurisdiction of the court that controls the trust. But in this Commonwealth there is no arbitrary, universal rule that an investment will not be approved if it consists of fixed property in another State.

In the present case it is said that the trust fund is very large, and that this is but a very small part of the whole, and it is expressly found that the investment "will not cause any loss to the estate, and that the trustees acted in good faith and with sound discretion." The only objection made at the hearing was that the trustees had no legal right to make an investment in real estate located outside of the Commonwealth. The appellant's contention, if sustained, would call for the establishment of an arbitrary rule which is inconsistent with the general rule as to trustees' investments heretofore existing in this Commonwealth.

Decree of Probate Court affirmed.

## IN RE MULHOLLAND'S ESTATE.

(Supreme Court of Pennsylvania, 1896, 175 Pa. 411; 34 Atl. 735.)

Godfrey Fisher was appointed guardian of Nancy Mulholland, minor child of Rudolph Mulholland, by the orphans' court of Center county, January 29, 1885. The proceeds of the estate were paid in to the guardian, in various sums, and at different times between 1885 and 1892. Of the amounts so paid in, the guardian used about $2,200 in the purchase of real estate on his own account. He loaned $3,700 to his son, and $330 to another person. The balance was deposited by the guardian in bank in his own name. He had no other funds in the bank. On July 27, 1894, the guardian filed his account, charging himself with the several sums received for his ward, and with interest thereon at the rate of 3 per cent., which was the amount allowed him by the bank on his deposit. Exceptions were filed on behalf of the ward, claiming that the guardian had failed to charge himself with proper interest. The account was referred to an auditor, who reported, charging the guardian with legal interest on the whole amount. The guardian excepted to the report of the auditor, and, his exceptions being overruled by the orphans' court, the guardian appealed.

The following is the opinion of the court (Archibald, J.) as to the material issue in the case.

"The facts in this case are not disputed. They all appear either by admitted vounchers, or have been drawn out of the accountant's own mouth upon the witness stand. They plainly show that he failed to exercise the care demanded in the management of a trust estate. He not only did not invest the moneys he received in approved real-estate mortgages, or other securities which the law recognizes, but he did not even seek an investment of any such kind. The only loans made were a small one to a man named Brown, and another to this the accountant's son, to put into Western land, both of which ended disastrously. He also used over $2000 to buy land for himself, and deposited the rest in the bank in his own name,—a small portion in the First National Bank of Clearfield, which failed, and the remainder with the private banking firm of Cochran, Payne & McCormick, of Williamsport. While these deposits, strictly speaking, were not min-

gled with his own money, yet they were made in his individual name, and stood, in consequence, at the risk of his personal credit. It cannot be considered, therefore, that they were really kept distinct and separate from his own private funds as the law requires. The truth is that while the accountant, in his own mind, may have individuated the estate of his ward, according to all outward observances he used and disposed of it pretty much as his own. Under the circumstances, he is properly held, not only for the bad investment—if investment it can be called—or that part of it which has been lost, but also for interest upon the whole of it, the same as though he had derived a direct benefit from its use. He practically has had the use of it, and must account accordingly. The case is substantially within the ruling in Copenheffer's Appeal, 3 Penny. 243, and other kindred cases. Both with regard to the general charges of interest, and the reduction of the accountant's compensation. I see no occasion to disturb the findings of the auditor." . . .

Per Curiam. This record discloses no error of which appellant has any just reason to complain. On the contrary, he appears to have been considerately and leniently dealt with by the learned auditor and the court below. His mismanagement of the trust—using his ward's funds in his own business, and so mingling the same with his own that it was impossible to trace investments, etc.— was such as to require the surcharges of interest, etc., and would also have justified the rejection of his entire claim for commissions; but as to that "the appellee does not complain," and hence the question is not properly before us. There is nothing in either of the specifications of error that requires special notice. The questions involved were sufficiently considered by the court below. . . .

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## MITCHELL'S ADM'R. v. TROTTER.

(Virginia Court of Appeals, 1850, 7 Gratt. 136.)

This was a suit in equity in the Circuit Court of Brunswick county, by Thomas R. Trotter and wife against Benjamin Wilkinson, administrator of Clement Mitchell deceased, the father of the female plaintiff, for a settlement of his administration account, and for a decree

for the amount which might be ascertained to be due to the plaintiff. . . .

ALLEN, J. The Court is of opinion, that the evidence in the record does not establish such a degree of negligence on the part of the appellant, as to subject him to a personal responsibility for his failure to institute legal proceedings against Robinson Ezell for the debt he, as administrator, had been compelled to pay on account of his intestate having been surety for said Ezell; that on the contrary, the testimony shews that Ezell was unable to pay the debt, and that with a knowledge of the facts established by the evidence, the administrator was not required, in the prudent discharge of his duty, to incur the costs of a suit against Ezell. And as the commissioner, by his special report of the payment and all the testimony bearing on it, submitted the question directly to the Court, whether the claim was properly disallowed, the Court, instead of a partial correction of the report in relation to said claim, should have allowed the administrator credit for the amount thereof. . . .

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## WATERMAN v. ALDEN.

(Supreme Court of Illinois, 144 Ill. 90, 32 N. E. 972.)

WILKIN, J. . . . That a loss to the complainants has been sustained by reason of the failure of appellees to collect the whole amount of these notes is not denied. That they might have been collected by the use of ordinary business management, and diligence, or secured, is clearly established by the evidence. We think it is equally clear that the trustees knew that said parties were heavily indebted, and liable to fail long before any effort was made by them to secure, or collect said indebtedness. The only finding of the court below on the facts is to that effect. While Special Master Loomis, by his report, excuses the conduct of the trustees, he does not do so on the ground that they were not negligent, but rather upon the theory, that, from the relations existing between the testator, and the Marsh's, it is fair to presume that he, if living, would have used no more care and diligence in enforcing those claims than did appellees. It need scarcely be suggested that no such test can properly be applied to the conduct

of trustees. There may be abundant reason for believing that Mr. Waterman, though a careful business man, would much rather have lost the indebtedness than to have pressed the collection of it, but that furnishes no excuse for these trustees to neglect or fail to use all reasonable diligence in the matter. Mr. Waterman might do with his own as he pleased, but the duties of these appellees are fixed by the law, and if they have violated those duties they are personally liable. . . .

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## BRYANT v. CRAIG.

(Supreme Court of Alabama, 1847, 12 Ala. 354.)

Ormond, J. The manner in which the account of the guardian was stated, presents the question, whether a guardian who retains his ward's money in his hands, without investing it, is subject to have annual rests made in his account, and charged compound interest.

The general rule applicable to all trustees is, that they should not be permitted to make a profit for themselves, by the employment of the funds in their hands, and if it be invested in trade, or otherwise profitably employed, the cestui que trust may insist on the profit so made, if he elect to do so. No question of that kind is made here, as it does not appear how, or in what manner these funds were employed by the guardian.

But although a trustee may not have invested the trust funds in such a manner, that the profits made by their employment can be ascertained, yet if he suffers the fund to be idle, when the terms of the trust, or the general law, requires it should be invested, so as to yield a profit, he is chargeable with simple interest; or if he is guilty of such gross neglect in the execution of the trust, as to be evidence of a corrupt intention, he may be charged with compound interest. These principles are fully illustrated in many cases, of which the following may be cited as examples: Foster v. Foster, 2 Bro. C. C. 616; Raphael v. Boehm, 11 Vesey, 92; Pocock v. Redington, 5 Id. 794; Dornford v. Dornford, 12 Id. 127; Schieffelin v. Stewart, 1 Johns. Ch. 620 (7 Am. Dec. 507); Clarkson v. De Peyster, 1 Hopk. Ch. 424.

As the guardian could not be guilty of negligence, in not investing the money of his ward, unless the law requires him to invest it, the first question which naturally presents itself is, what is the law upon the subject? Our statute law, though very full and particular, as to the mode of appointing guardians, making settlements with them, &c., is silent upon this particular. It results however, necessarily, from the nature of the trust, that the estate of the ward should be profitably employed, as otherwise it would be consumed, and where it consists of money, this could only be by lending it out on good security. In England, a trustee whose duty it is to invest the money in his hands, is exonerated from liability, by investing it in the public funds, which, as the court would direct to be done on application, it will sanction if done without such application, and he will be exonerated from liability, though the stock should fall in value. Franklin v. Frith, 2 Bro. C. C. 433; Holmes v. Dring, 2 Cox, 1. In Smith v. Smith, 4 Johns. Ch. 445, Chancellor Kent seems to think, that personal security is insufficient, and that a trustee lending money, must require adequate real security, or resort to the public funds. Here are no public funds in which money may be safely and securely invested. At least there has been none until very recently, and it is not probable we shall be long burthened with a public debt.

Personal security, no matter how good it was deemed at the time, would not be sufficient; and it may be added, that with us, real property is subject to such fluctuations, that it is by no means an adequate security; and it may very well be doubted, whether he would not be personally liable, for any loan he may have made of the money, without the sanction of the court, no matter what security he may have taken. Our statute appears to have intended to place this whole matter under the direction of the orphans' court, as it invests that court with power to direct a sale of the land of the ward, if the personal estate, and the rents and profits of the realty, were insufficient for his support; and it appears to follow necessarily, that the same court would have the power to direct in what manner the money of the ward should be invested. It was the duty of the guardian, if he desired to exonerate himself from the payment of interest, to apply to the court for direction in the investment of the funds, who would have examined the proposed security, and whose approbation would have exonerated the guardian from liability, if afterwards lost without his neglect.

The guardian having omitted to make this application, must pay interest on the funds in his hands, whether they have been profitable to him or not, and we next proceed to inquire, whether this is such gross negligence, as will authorize rests to be made in the account, for the purpose of charging him with compound interest.

The general rule undoubtedly is, that where it is the duty of the trustee to invest the trust funds, and he fails to do so, he is chargeable only with simple interest. See the cases already cited, and Newton v. Bennett, 1 Bro. C. C., in the note to which, Mr. Eden has collected all the authorities, establishing conclusively, that for neglect merely, the practice of the court is, to charge interest at the rate of four per centum. Where the trustee is guilty of fraud or corruption, as where, in open violation of the trust, he applies the funds to his own use in trade; converts the property, or securities, as for example, stock, into money, and applies it to his own use; or otherwise corruptly and fraudulently abuses the trust reposed in him; he may be charged with compound interest. . . .

The charge of compound interest, seems to be adopted as a punishment in those cases, where from the gross mismanagement of the trustee, it is difficult, if not impossible to ascertain, what the income of the estate would otherwise have been; but it may be safely asserted, that no estate in money, under the most judicious management, can be made to yield compound interest, at the rate of eight per centum. If it had been annually invested, under the direction of the court, some delay must have been encountered, in finding a person desirous to borrow, and able to give the necessary security. It is not reasonable to presume, that where so lent, it would always be punctually paid, so as to be immediately re-invested; nor can it be doubted, that it would frequently be necessary to coerce payment by suit and that after every precaution had been taken, both principal and interest would occasionally be lost. The charge of compound interest, therefore, is unjust, because the estate could not have yielded that by any prudent management in the hands of the owner, had he been of age to manage it himself.

The mere omission of the guardian, to apply to the court for authority to invest it, and the failure to make annual settlements, are not evidence of fraud, but establish negligence merely, and the court therefore acted correctly in refusing to allow compound interest. . . .

## WHITTLESEY v. HUGHES.

(Supreme Court of Missouri, 1866, 39 Mo., 13.)

Fagg, J. . . . It is insisted by the plaintiff in error that Williams could legally convey the estate and transfer the power which had been conferred upon him by the deed of trust. The habendum was "to said trustees and the survivor of them, and to the heirs, executors, administrators and *assigns* of said survivor, in trust," &c. Much stress is laid upon the word *assigns*, and the case of Titby v. Wolstenholme, 7 Beav. 425, is cited as authority to show that a devise made by the surviving trustee of a trust estate was valid, no express power of appointing new trustees being given by the will. From this decision the argument is made in this case that the power to convey by deed, and to make an appointment of a new trustee, must necessarily follow. Let us see the reasoning in the case referred to. The Master of the Rolls said, "we have in this will expressions which clearly show that the testator intended the trusts to be performed by the 'assigns' of the surviving trustee; and in construing the will, we must, if practicable, ascribe a rational and legal effect to every word which it contains. *We cannot consistently with the rules of this court consider the word 'assigns' as meaning the person who may be made such by the spontaneous act of the surviving trustee, to take effect during his life;* but there seems nothing to prevent our considering it as meaning the person who may be made such by devise and bequest; and if we do not consider the word 'assigns' as meaning such persons, it would in this will have no meaning or effect whatever." It is clear that the construction given by the court in that case was because it was absolutely necessary to give any effect or meaning to the will whatever. The doctrine is most clearly enunciated, as it is everywhere else, that the trustee could not while living without an express authority for that purpose, delegate his power to another; and it is difficult to see how it can be relied upon as an authority to support the deed of Williams to the plaintiff. . . .

## KATZ v. MILLER.

(Supreme Court of Wisconsin, 1912, 148 Wis. 63; 133 N. W. 1091.)

SIEBECKER, J. . . . The evidence fails to show that Miss Chaffee took any active part in the management of the property, but it shows that in the control and management of this property Bigelow practically did everything required to be done to discharge the obligations imposed by the trust. It is averred that this does not constitute proof authorizing Bigelow to act for Miss Chaffee as such trustee, because his asserted authority cannot be established by such declarations. We do not regard his statements as irrelevant to the inquiry; they bear on the question of his authority to act for her, and should be considered in connection with the other facts and circumstances of the case. It is undisputed that he as trustee did the negotiating for this lease; that he dealt with the plaintiff concerning the assignment thereof to the plaintiff, and conducted all of the transactions, including the reception of the rents due under the lease, practically as sole trustee, for a period of over a year, and that Miss Chaffee at no time throughout this time appeared to take part in or objected to this method of conducting the business in which she was a co-trustee. Her conduct respecting the matter is persuasive as tending to show that she did intrust the entire management of the trust and the control and handling of the trust property to her co-trustee, Bigelow, and tends to support the evidence of Bigelow that she conferred full authority on him to act for and represent her in all these respects. The acts of Bigelow must be held to have had her approval and assent and to be binding on them as trustees in the transactions between them and the plaintiff concerning this lease and the occupancy and use of the trust property. . . .

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## MARKEL v. PECK.

(Missouri Court of Appeals, 1910, 144 Mo. App. 701; 151 S. W. 772.)

COX, J.—Action for damages for breach of contract, trial by jury and verdict for plaintiff. . . .

The court, in sustaining the motion for a new trial in this case, recited that it was by reason of the error of the court in giving instruction number one on behalf of plaintiff. This instruction told the jury that if they should believe from the evidence that on or about said 6th day of March, 1903, said trustees, defendants herein, or a majority of them, authorized Stephen Peck & Bro. to execute the contract for lease, read in evidence, and that said Stephen Peck and Bro. did execute such contract, and that plaintiff had fully performed, or offered to perform, its conditions upon his part, and that the defendants, or a majority of them, had refused to perform the same in accordance with the terms thereof, then the verdict should be for the plaintiff, and unless they should so find the facts, the verdict should be for defendants. Appellant insists that this instruction was correct under the evidence, and that the verdict was for the right party, while respondents insist that the instruction was wrong for the reason that the defendants as trustees had no power to delegate their authority, and, for that reason, could not appoint an agent to execute a contract, and further that the authority of the agent, if permissible at all, must be in writing, and that a trustee, either by himself or an agent could not execute a lease to begin in futuro.

The first proposition that confronts us in this investigation is as to whether or not those defendants, trustees under the will of Charles H. Peck, invested with the power to manage and control the estate committed to their charge, and to execute leases thereon, could delegate that power by appointing an agent to attend to that matter for them.

The general rule is that a trustee of an express trust, invested with powers, the execution of which calls for the exercise of discretion and judgment on the part of the trustee, cannot delegate such powers to any one, and, hence, the performance of any act, requiring the exercise of discretion, must be done by the trustee himself and cannot be delegated to an agent. (1 Perry on Trusts, 402; Graham v. King. 50 Mo. 22; Bales v. Berry, 51 Mo. 449; Polliham v. Revely, 181 Mo. 622, 81 S. W. 182.)

The office of trustee is one of personal confidence and cannot be delegated. The reason of the rule lies in the fact that the grantor who creates a trust and invests the trustee with powers, calling for the exercise of discretion on the part of the trustee in their execution,

selects the trustee by reason of his confidence in the integrity and good judgment of the trustee, and when the trustee accepts the trust, he does so with the implied understanding that he will discharge the duties incumbent upon him, by reason of the trust, according to his own best judgment, and, hence, unless the grantor expressly provides that the trustee may delegate the powers conferred, he cannot do so. He may delegate authority to perform a purely ministerial act; that is, an act not requiring the exercise of discretion, for this is not a delegation of the trust. "The trustee must, at times, act through attorneys or agents, and, if he determines in his own mind how to exercise the discretion and appoints agents or instruments to carry out his determination, he cannot be said to delegate the trust, even though deeds or other instruments are signed by attorneys in his name." (Perry on Trusts, sec. 409.)

It has been uniformly held in this State that trustees, appointed in a deed of trust, to make sale of land conveyed therein, cannot delegate the power to make the sale, and the reason assigned is well stated by Wagner, Judge, in Graham v. King, 50 Mo. 22, as follows:—"The office and duties of a trustee are matters of personal confidence, and he must exercise a just and fair discretion in doing whatever is right for the best interest of the debtor. He must in person supervise and watch over the sale, and adjourn it if necessary, to prevent a sacrifice of the property, and no one can do it in his stead unless empowered thereto in the instrument conferring the trust. A trustee cannot delegate the trust or power of sale to a third person, and a sale executed by such delegated agent is void."

If this rule should prevail in the matter of a sale of land for the purpose of collecting a debt, under a power granted in a deed of trust, in which the duty of the trustee, in executing the trust, is specifically provided, it should, for a much stronger reason, apply to a trustee charged with the management of a large estate for a long term of years which necessarily requires the constant exercise of vigilance and discretion.

In this case, the will under which these trustees were acting made no provision whatever for a delegation, by them, of any of the powers conferred upon them under the will, and our conclusion is that they possessed no power to appoint an agent, either verbally or by writing, and shift to the agent the performance of any duty requiring the

exercise of any discretion upon their part; and as the execution of a contract, such as the one sued upon in this case, necessarily called for the exercise of some discretion and judgment, it could not be executed in a way to bind the estate or these defendants in their capacity as trustees, by any agent which they might appoint. True, they might, if they had agreed upon the contract themselves, settled its terms and agreed upon every question requiring the exercise of discretion or judgment, delegate to an agent the naked power to sign the contract, but that is not this case. The evidence in this case wholly fails to show that the trustees made this contract. The contract purports upon its face to have been executed by an agent of these defendants, and plaintiff tried his case upon that theory. . . .

# SELECTED
# CASES ON EQUITY

BY

GEORGE L. CLARK
*Author of "Principles of Equity"*

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PART III—CHAPTERS VI TO XI.

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# TABLE OF CONTENTS

## PART III.

### CHAPTER VI.


Reformation of Instruments ........ 1


### CHAPTER VII.


Rescission ........ 46

Section 1. Mistake ........ 46

Section 2. Fraud ........ 67

Section 3. Duress and Undue Influence ........ 82

Section 4. Illegality—Breach of Contract ........ 88


### CHAPTER VIII.


Bills Quia Timet and to Remove Cloud on Title ........ 94

Section 1. Cancellation of Contracts ........ 94

Section 2. Bills to Remove Cloud on Title ........ 105

Section 3. Other Quia Timet Relief ........ 120


### CHAPTER IX.


Bills of Interpleader ........ 125


### CHAPTER X.


Bills of Peace ........ 159


### CHAPTER XI.


Miscellaneous ........ 195

# TABLE OF CASES

Acheson v. Miller ............. 209
Adams v. Gillig ............... 70
Adm'r of McDonald, Glastonbury v. ..................... 103
Armstrong, Cogswell v. ....... 131
Arthur, Fargo v. .............. 130
Ashurst v. McKenzie .......... 117
Atkins v. Chilson ............. 217

Ballou v. Inhabitants of Hopkinton ....................... 167
Barringer, Beeler v. .......... 195
Bates v. Delavan .............. 46
Batty v. Chester .............. 88
Beeler v. Barringer ........... 195
Blettner, Jack v. ............. 67
Blodgett, Park Bros. v. ....... 21
Boston, Welch v. .............. 132
Breen v. Donnelly ............. 36
Brown, Cadigan v. ............. 159
Brown v. Cozard ............... 213
Broughton v. Hutt ............. 54
Byers v. Sansom Thayer Co. 125, 139

Cadigan v. Brown .............. 159
Camplin, Parish v. ............ 32
Capshaw v. Fennell ............ 2
Carmichael v. Lathrop ......... 228
Carpenter, Cook v. ............ 175
Central Lead Co., Roberts v. ... 96
Chadwick, Langworthy v. ....... 120
Challen, Holland v. ........... 180
Chester, Batty v. ............. 88
Chicago v. Chicago City Ry. Co. 169
Chicago, Wilkie v. ............ 171
Chicago City Ry. Co., Chicago v. 169
Chilson, Atkins v. ............ 217
Clowes v. Higginson ........... 56
Cogswell v. Armstrong ......... 131
Cook v. Carpenter ............. 175
Cook v. Earl of Rosslyn ....... 146
Cooper v. Joel ................ 98
Covington, Skinkle v. ......... 192
Cowls v. Cowls ................ 224
Cozard, Brown v. .............. 213
Crane v. McDonald ............. 127
Credits Gerendeuse v. Van Weede ....................... 137
Crowder, Matthews v. .......... 92
Curteis v. Wormald ............ 197

Dambman v. Schulting .......... 49
Davenport v. Sovil ............ 44
Davies v. Humphries ........... 207
Day Co. v. State .............. 105
Delavan, Bates v. ............. 46
DeZoya, Wierich v. ............ 220
Dickson, Musgrave v. .......... 204
Donnelly, Breen v. ............ 36
Dowe, Galveston, etc. R. R. v. .. 187
Dunn v. Dunn .................. 86
Duval v. Wellman .............. 89

Earl of Powis, Powell v. ...... 160
Earl of Rosslyn, Cook v. ...... 146
Emerson, Gould v. ............. 52
Emmett, Post v. ............... 126
Ensminger, Kinney v. .......... 37

Fargo v. Arthur ............... 130
Fennell, Capshaw v. ........... 2
Fetters, Stafford v. .......... 19
Fluker v. Taylor .............. 203
Fly, Smith v. ................. 3
Fort Dearborn Bank, Rauch v. . 143
Frazier, Garrison v. .......... 112
Frost v. Spitley .............. 108

Gale v. Lindo ................. 94
Galveston etc. R. R. v. Dowe ... 187
Gans, Swedesboro, L. & B. Ass'n v. ....................... 59
Gardner, McRee v. ............. 114
Garrett, Peirce v. ............ 205
Garrison v. Frazier ........... 112
Gee v. Spencer ................ 53
German etc. Ins. Co. v. Van Cleave ..................... 172
Gill, Noel's Ex'r v. .......... 26
Gillig, Adams v. .............. 70
Gilmore v. Thomas ............. 40
Glastonbury v. Adm'r of McDonald ...................... 103
Gorman v. Mullins ............. 226
Gorton, Moeckly v. ............ 101
Gould v. Emerson .............. 52
Green, Quinn v. ............... 153
Griffiths, Summers v. ......... 80
Gruenstein, Gurley v. ......... 155
Grymes v. Sanders ............. 64
Gurley v. Gruenstein .......... 155

Hamilton v. McLean ---------- 221
Hammond v. Pennock ---------- 78
Hammond Co., Papke v. ------ 95
Harlow v. LaBrun ------------ 71
Hartford Ins. Co., Palmer v. --- 38
Hennesy, Pitcher v. ----------- 18
Hervey, Metcalf v. ------------ 130
Higginson, Clowes v. ---------- 56
Holland v. Challen ------------ 180
Home Ins. Co., Virginia etc. Co. v. -------------------------- 179
Hopkins, Southern Steel Co. v. 164
Hough, Wetherill v. ---------- 198
Howard, Lent v. -------------- 195
Huckabee, U. S. Lyon etc. v. -- 82
Humphries, Davies v. --------- 207
Hunger, Sanxay v. ------------ 117
Hutt, Broughton v. ------------ 54
Hutton, Ivinson v. ------------- 1

Inhabitants, etc., Ballou v. ----- 167
Ivinson v. Hutton ------------ 1

Jack v. Blettner -------------- 67
Joel, Cooper v. ---------------- 98
Jordan v. Stevens ------------- 62

Keister v. Meyers ------------- 11
Keyes v. Little York, etc. Co. -- 162
King v. Townshend ------------ 115
Kinney v. Ensminger ---------- 37
Knight, Thornton v. ----------- 97
Koppinger v. O'Donnell ------- 156
Kowalke v. Milwaukee etc. Ry. Co. -------------------------- 46

LaBrun, Harlow v. ------------ 71
Langworthy v. Chadwick ------ 120
Lathrop, Carmichael v. -------- 228
Legate v. Legate -------------- 15
Lent v. Howard --------------- 195
Lindley, Vanatta v. ------------ 100
Lindo, Gale v. ---------------- 94
Linington v. Strong ----------- 76
Little York etc. Co., Keyes v. -- 162
Lockwood, Mills v. ----------- 35
Lund v. Seamen's Bank ------- 147
Lyman v. United Ins. Co. ------ 58
Lytle v. Sandefur ------------- 107

McAvoy, Sibert v. ------------- 44
McClurg v. Phillips ----------- 216
McConnell v. Scott ------------ 211
McDonald, Crane v. ---------- 127
McKenzie, Ashurst v. --------- 117
McLean, Hamilton v. ---------- 221
McRee v. Gardner ------------ 114
Macomber v. Peckham -------- 24
Makepeace v. Rogers --------- 200
Marshall, Paget v. ------------ 7
Matthews v. Crowder --------- 92
Metcalf v. Hervey ------------ 130
Meyer, Steuart v. ------------- 111
Meyers, Keister v. ------------ 11
Miller, Acheson v. ------------ 209
Mills v. Lockwood ------------ 35
Milwaukee etc. Ry. Co., Kowalke v. ------------------------- 46
Miner, Wells-Fargo Co. v. ----- 149
Mitchell, Vanderbilt v. -------- 73
Moeckly v. Gorton ------------ 101
Morse v. Woodworth --------- 83
Mullins, Gorman v. ----------- 226
Musgrave v. Dickson --------- 204

Nickell, Shroyer v. ----------- 34
Noel's Ex'r v. Gill ------------- 26

O'Donnell, Koppinger v. ------- 156

Paget v. Marshall ------------- 7
Palmer v. Hartford Ins. Co. --- 38
Papke v. Hammond Co. ------- 95
Parish v. Camplin ------------- 32
Park Bros. v. Blodgett -------- 21
Partridge v. Partridge -------- 16
Patton, Quinn v. -------------- 152
Peckham, Macomber v. -------- 24
Peirce v. Garrett -------------- 205
Pennock, Hammond v. -------- 78
Phillips, McClurg v. ----------- 216
Pitcher v. Hennesy ------------ 18
Post v. Emmett --------------- 126
Potter v. Potter --------------- 30
Powell v. Earl of Powis ------- 160
Prudential Assurance Co. v. Thomas ---------------------- 135

Quinn v. Green --------------- 153
Quinn v. Patton --------------- 152

Rauch v. Ft. Dearborn Bk. ----- 143
Relief Ins. Co., Steinbach v. ---- 41
Roberts v. Central Lead Co. --- 96
Rogers, Makepeace v. --------- 200

St. Louis, Sylvester Coal Co. v. - 184
Sandefur, Lytle v. ------------- 107
Sanders, Grymes v. ----------- 64
Sanger v. Wood -------------- 77
Sansom-Thayer Co., Byers v. --------------------- 125, 139
Sanxay v. Hunger ------------ 117
Schisselbauer, Wadsworth v. -- 215
Schulting, Dambman v. -------- 49
Scott, McConnel v. ------------ 211
Seamen's Bank, Lund v. ------- 147
Seely, Woodward v. ----------- 184
Sherwood v. Sherwood -------- 28
Shroyer v. Nickell ------------ 34
Sibert v. McAvoy ------------- 44
Skinkle v. Covington ---------- 192
Smith v. Fly ------------------ 3
Southern Steel Co. v. Hopkins - 164

Sovil, Davenport v. 44
Spencer, Gee v. 53
Spitley, Frost v. 108
Stafford v. Fetters 19
Stark, Webster v. 13
State, Day Co. v. 105
State ex rel v. Westfall 119
Steinbach v. Relief Ins. Co. 41
Steuart v. Meyer 111
Stevens, Jordan v. 62
Strong, Linington v. 76
Strong v. Williams 230
Summers v. Griffiths 80
Swedesboro L. & B. Ass'n v. Gans 59
Sylvester Coal Co. v. St. Louis 184

Taylor, Fluker v. 203
Thomas, Gilmore v. 40
Thomas, Prudential Assurance Co. v. 135
Thornton v. Knight 97
Townshend, King v. 115

United Ins. Co., Lyman v. 58
United States, Lyon etc. v. Huckabee 82

Vanatta v. Lindley 100
Vanderbilt v. Mitchell 73
Van Cleave, German etc. Ins. Co. v. 172
Van Duyne v. Vreeland 122
Van Weede, Credits Gerendeuse v. 137
Virginia etc. Co. v. Home Ins. Co. 179
Vreeland, Van Duyne v. 122

Wadsworth v. Schisselbauer 215
Wampler v. Wampler 91
Warington v. Wheatstone 134
Washington Co. v. Williams 177
Webster v. Stark 13
Welch v. Boston 132
Wellman, Duval v. 89
Wells-Fargo Co. v. Miner 149
Westfall, State ex rel v. 119
Westfeldt, Winston v. 233
Wetherill v. Hough 198
Wheatstone, Warington v. 134
Wierich v. De Zoya 220
Wilkie v. Chicago 171
Winston v. Westfeldt 233
Williams, Strong v. 230
Williams, Washington Co. v. 177
Wood, Sanger v. 77
Woodward v. Seely 184
Woodworth, Morse v. 83

# CASES ON EQUITY

## PART III.

## CHAPTER VI. REFORMATION OF INSTRUMENTS

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### IVINSON v. HUTTON.[1]

(Supreme Court of the United States, 1878, 98 U. S. 79.)

Mr. Justice Clifford. . . . Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by illegality or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded.

Equities of the kind, whether it be for the re-execution, reform, or rescission of the instrument, like the equity for specific performance of a contract, are incapable of enforcement at common law, and therefore necessarily fall within the peculiar province of the courts invested with equitable jurisdiction.

Power to reform written contracts for fraud or mistake is everywhere conceded to courts of equity, and it is equally clear that it is a power which cannot be exercised by common-law courts. Hearne v. Marine Insurance Company, 20 Wall. 490.

Relief in such a case can only be granted in a court of equity; and Judge Story says, if the mistake is made out of proofs entirely satisfactory, equity will reform the contract so as to make it conform to the precise intent of the parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the con-

[1] The statement of facts has usually been omitted. Where parts of the opinion have been omitted, such omission has been indicated thus: . . .

trary is established beyond reasonable controversy. 1 Story, Eq. Jur. (9th ed.), sect. 152; Gillespie v. Moon, 2 Johns. (N. Y.) Ch. 585; Rhode Island v. Massachusetts, 15 Pet. 271; Daniel v. Mitchell, 1 Story, 172.

Authorities which support that proposition are quite too numerous for citation, and the rule is equally well established that parol proof is admissible to prove the alleged accident or mistake which is set up as the ground of relief. Hunt v. Rousmanier, 8 Wheat. 174; 1 Story, Eq. Jur. (9th ed.), sect. 156; 3 Greenl. Evid. (8th ed.), sect. 360; Adams, Eq. (6th ed.) 171.

Support to the latter proposition is also found in all the standard writers upon the law of evidence. Courts of equity, says Taylor, will also admit parol evidence to contradict or vary a writing where, by some mistake in fact, it speaks a different language from what the parties intended, and where, consequently, it would be unconscionable or unjust to enforce it against either party, according to its terms. 2 Taylor, Evid. (6th ed.) 1041.

Viewed in the light of these suggestions, it is evident that the ruling of the court below, that the complainant had a plain, adequate, and complete remedy at law, was erroneous and utterly subversive of the complainant's rights, as it is clear that the common-law courts could not give him adequate relief.

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## CAPSHAW, ET AL. v. FENNELL.

(Supreme Court of Alabama, 1848, 12 Ala. 780.)

DARGAN, J. . . . The contract in this case, was for the sale of a tract of land, containing 300 acres, more or less. The vendor represented to the vendee, that it contained 300 acres, when in fact is contained only 282 acres, but the sale was not expressly by the acre, but was for a gross sum, for the tract. The contract of sale was entered into in December, 1840, and a deed was made to the complainant by Simmons, in whom was the title, in March, 1842. The vendor never had any written title, and from the answer, and all the circumstances brought to the notice of the court by the record, we believe that the representation was innocently made. The defendant

purchased the tract, and paid for it, supposing it contained 300 acres, and there is no evidence whatever to show, that he discovered the mistake, at any time previous to the final consummation of the contract.

The law is that if the vendor makes false representations as to the quantity of land about to be sold, knowing them to be false, the vendee may have compensation for the deficiency. (Taylor v. Huston) 2 Hen. & M. 161; Sugden on Vend. 391; Minge v. Smith, 1 Ala. 415. But here the representation was innocently made, under the belief that the tract of land contained 300 acres. This was a mere mistake, not a fraud. When there has been a mutual mistake as to the quantity of land sold, it is difficult to lay down any precise rule, that will always guide us in determining when compensation will, and when it will not be allowed; but inasmuch as the complainant in this case, received the deed in March, 1842, and on the face of the deed, notice of the deficiency is fully given, a year afterwards he renewed his note for the small balance of the purchase money, without objction or claim for compensation, we believe, that if the true quantity had been known at the time of entering into the contract, to both parties the terms of the contract would not have been altered. We arrive at this conclusion of fact, from the nature of the contract itself; from the conduct of the complainant in receiving the deed, which gives notice of the deficiency on its face, without objection; then a year after, as stated, renewing his note for the balance of the purchase money, then saying nothing of the deficiency. Also, the exhibits, being the letters of the defendant, show, that the locality was a leading inducement to the contract; and we cannot come to the conclusion that the terms of the contract would have been altered, had the true quantity been known. In this case, then we cannot conceive how compensation can be allowed.

The decree therefore, dismissing the bill, was correct, and is hereby affirmed.

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## SMITH v. FLY.

(Supreme Court of Texas, 1859, 24 Texas 345.)

WHEELER, C. J. . . . It appears to be settled that, in the sale of land, where there has been misrepresentation as to the quantity,

though innocently made, and the parties were under a mistake as to the quantity, and the deficiency is so great as to have been material, in the object of the purchase, affecting the essence of the contract, equity will grant relief. 1 Sug. Vend., ch. 7, sec. 3; Mitchell v. Zimmerman, 4 Tex. 75; 4 Kent, Com. 457; 1 Story, Eq., Sec. 141. And this, says Judge Story, would be so, although the land was described as so many acres, "more or less." It would certainly be so, where the land is sold by the acre, and the statement of the quantity of acres in the deed is not mere matter of description, but is of the essence of the contract.

The plaintiff alleges, that he bought and paid for the land, by the acre; that there was misrepresentation, and a mistake as to the quantity of land conveyed; and that it fell short 115 acres of the quantity the tract was supposed to contain, and the deed purported to convey. A deficiency so great, in a sale by the acre, of a tract of 500 acres, can scarcely be supposed to have been within the risk which the parties meant to incur, or to have been intended to be embraced by the words "more or less," employed in the deed. There can be little doubt that the allegations of the petition show a cause of action; and the question is, whether it was barred by the statute of limitations, at the time of bringing the suit.

It has been adjudged, by very high authority, upon full consideration, that an action at law, for money had and received, could not be maintained in a case like the present, to recover back the money paid for the number of acres alleged to be deficient. The purchaser must resort to a court of equity to obtain relief on the ground of mistake. Homes v. Barker, 3 Johns. 506, 510. If the present suit be regarded as an action at law, for money had and received, or as an action to recover back, money paid by mistake, it must be held that the cause of action accrued immediately upon the payment of the money; and consequently, that the right of action was barred. . . . But the present is not a case in which an action at law, to recover back money paid by mistake, would be the proper remedy, in those countries where the jurisdiction of law and equity are distinct. The ground of relief is the mistake, which having been carried into the deed, the remedy is in equity. In the case first above cited (3 Johns. 510), Kent, C. J., said: "I confess that I have struggled hard, and with the strongest inclination, to see if the action for money had and received, would

not help the plaintiff in this case; but I cannot surmount the impediment of the *deed,* which the plaintiff has accepted from the defendant, and which contains a specific consideration, in money and the quantity of acres conveyed, with the usual covenant of seizin. Sitting in a court of law, I think I am bound to look to the deed, as the highest evidence of the final agreement of the parties, both as to the quantity of the land to be conveyed, and the price to be given for it. If there be a *mistake* in the deed, the plaintiff must resort to a court of equity, which has had a long established jurisdiction in all such cases, and where even parol evidence is held to be admissible, to correct the mistake."

The plaintiff's case is one where the remedy is for equitable relief, upon the ground of mistake. 1 Story, Eq. Secs. 141, 144. Though the statutes of limitations are not, in their terms, applicable to courts of equity, yet, in administering relief, they act in obedience and analogy to the statute, and refuse relief wherever the claim would have been barred by the statute, if it had been made in a court of law. Angell, Limitations, Sec. 26; 12 Pet. 56; 1 Story, Eq. Secs. 64a, 529. Courts of equity, it has been said, are no more exempt from statutes of limitations, than courts of law. Id. Where the statute is applicable to a claim in our courts, it must have its full effect and operation upon it, whether the case be of legal or equitable cognizance. But if the statute does not in terms apply to the case, it has been held to be governed by the analogies in like cases, which are expressly within its provisions. 21 Tex. 264; Leavitt v. Gooch, 12 id. 95. If the present case, being a suit to correct a mistake, and for compensation for a deficiency in the quantity of the land purchased, is not expressly within the statute, the analogy would seem to be, to an action to recover back money paid by mistake, in those cases where the mistake is not of such character as that the law will hold the party paying concluded thereby, and would bring the case within the period of limitation prescribed in the first section of the statute. O. & W. Dig. art. 1333.

In equity, as at law, the general rule is, that the cause of action arises whenever the party is entitled to bring suit; or as soon as he has a right to apply to a court of equity for relief. 2 Story, Eq., sec. 1521a. In cases of fraud and mistake, it will not begin to run until the time of the discovery of the fraud or mistake. Id. Whether fraud or

mistake will be admitted, as an exception to the running of the statute, is an open question in this court. Smith v. Talbot, 18 Tex. 782; Mason v. McLaughlin, 16 id. 29.

But if it be admitted as an exception, it is settled that it will only prevent the running of the statute until the fraud is discovered, or by the use of reasonable diligence, might have been discovered by the party applying for relief. Thus, in the case of Grundy v. Grundy, 12 B. Mon. 269, it was held, in the case of a mistake as to the quantity of land sold, that the statute does not begin to run till the mistake is discovered, or until it ought to have been discovered. But the opinion of the court appears to have been, that to prevent the lapse of time from operating to bar the suit, the plaintiff must show that it was not for the want of ordinary diligence that the mistake was not discovered until within the period of limitation. Id. 271. And in Smith v. Talbot, 18 Tex. 774, it was held by this court to be the rule, where fraud is allowed as an exception to the statute, that the right of action shall be deemed to have accrued to the plaintiff at the time when the discovery of the fraud was made, or when, by the use of reasonable diligence, it might have been made; and the rule was applied in the determination of that case.

The plaintiff alleges that he did not discover the deficiency in the quantity of land, "until some time in the month of January last." But he does not assign any reason why the discovery was not sooner made. There was nothing in the nature of the fact, to prevent a discovery. A survey, which might have been made at any time, would at once have led to it. And the failure to resort to so obvious a means, in the absence of the suggestion of any other cause for the omission, can but be regarded as attributable solely to the plaintiff's own negligence. We think the discovery of a fact, susceptible of being so readily ascertained, ought to have been sooner made. Then negligence of the plaintiff may have put it out of the power of the defendant to have recourse upon his vendor, and to permit a recovery against him after such a lapse of time, might work an irreparable injury, which it probably would not have operated, had the discovery been made earlier, when we think, it ought to have been made. We are therefore of opinion, that the failure to discover the mistake is no answer to the running of the statute.

## PAGET v. MARSHALL.

(Supreme Court of Judicature, 1884, L. R. 28 Ch. D. 255.)

BACON, V. C. . . . In all these cases on the law of mistake it is very difficult to apply a principle, because you have to rely upon the statements of parties interested, and upon not very accurate recollections of what took place between them. But the law I take to be as stated this morning by Mr. Hemming. If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement or any other deed, that upon proper evidence may be rectified—the Court has the power to rectify, and that power is very often exercised. The other class of cases is one of what is called unilateral mistake, and there, if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into. . . .

The case before me is in a very narrow compass. The plaintiff had taken the lease of a site from the Goldsmiths' Company upon a contract to build upon it a very valuable and commodious structure. He did so, and his plans are in evidence, it is quite clear what his intention was. He built two separate ground-floor tenements, Nos. 49 and 50, to be let to two separate tenants. He kept a third, No. 48, including ground and first floors, intending to occupy it himself, and the fourth part, that coloured blue on the model, he had to let when the negotiation commenced with the Defendant. So that the subject in dispute is beyond all question. The two shops, Nos. 49 and 50, were separate and distinct things—as separate as if they had been in some other street—and the third, No. 48, was equally separate and distinct—built by the Plaintiff for his own occupation, and for carrying on his own business, and constructed so that those objects might be conveniently performed by him. To that end he built on the ground floor of No. 48 a staircase communicating with the first floor of No. 48, and he partitioned off the first floor of No. 48, so that in its turn it became just as distinct a building—just as distinct a tenement—as

Nos. 49 and 50, and the purpose was distinct. Then, the part coloured blue (which included the whole first floor of the block except that of No. 48, and all the upper floors without any exception) being still available, and the Plaintiff willing to let it, he constructed a staircase which led from the street past the first floor of No. 48, and landed upon the blue part, I will call it, that is sufficient description,—no communication whatever either in fact being made, or according to the evidence ever intended to be made, between the ground or first floor of No. 48 and the part coloured blue. That was the state of things when these parties met to negotiate. The petition which effectually severed the first floor of No. 48 from the part coloured blue, had been completely settled and arranged. The Defendant on his first visit looked over all that was then to let, ascertained what the Plaintiff meant to let, saw the first floor over No. 48, said that it would make a very handsome warehouse, but knew at the same time that it was not to be let, because, to use his own expression in his own evidence, the Plaintiff told him "we mean to use that for ourselves." That is the evidence which the Defendant has given on this occasion. He says that he was satisfied to some extent with what he looked at, and desired to acquire it, but he must have a packing-room. He could not mean the first floor, that which he said was a magnificent warehouse could not be a packing-room, it could not in the nature of things; and he does not say that that was in his mind, still he insists more than once on the necessity of having a packing-room. I am mentioning these facts in order to ascertain, as it is my duty to do, what I must take to be proved to have been the intention of the parties when they entered into the negotiation. He asks for a packing-room. The brother goes with him down into a cellar—a cellar under No. 48, in the basement of No. 48—they look about there, and the brother comes in and says, "You cannot have it." No wonder, because there can be no access to it but from the floor of No. 48, and that went off.

Now, it would be impossible for me to connect, and there was a very faint attempt made to connect, the necessity which was present in the Defendant's mind to have a packing-room, with the magnificent first floor, which he now says he had in his mind when he was present. The statement about putting up the inscription by no means encourages any such notion. The Defendant desired to advertise to the public by means of a large inscription on the front of that which was

to be his, the trade he was carrying on. He wished also to have a similar inscription over No. 48. That was resisted. It was the subject of discussion between them; the reason it was resisted was explained to him: "If we granted you that, it would look as if you were carrying on your business in our warehouse; "but they said that, in order to accommodate him they would be willing to insert a tablet, containing his name and business, provided it did not interfere with the architectural decorations of No. 48. These facts are beyond all question. Both parties are agreed. Then the plaintiff writes a letter in which he offers to let, among other things, the first floor of No. 48. This is answered very readily by the Defendant, who accepts the offer. Instructions are sent to the solicitors, instructions consisting only of this letter. Mr. "Marten" made a point that the plaintiff, in his pleadings, said they had no other instructions. They must have had some other instructions. I should read the word "other" used by him in the pleadings as meaning no different instructions, no variation in form or otherwise from the words that appear in the letter. Then the lease is prepared and executed in accordance with the letter, including the first floor of No. 48.

Under these circumstances, the facts being as I have stated, am I, because the lease has been executed under seal, demising to the defendant that which the plaintiff never meant to let him have, that which the defendant says he knew at one time the plaintiff intended to keep for himself, that which he has never claimed at any period prior to the letter—am I to say that the agreement is to be held to be irrevocable? It would be against every principle that regulates the law relating to mistakes, and it would be directly at variance with the proved facts in this case. On the evidence, it looks very like a common mistake. The defendant, it is true, says in his defense, that he took it on the faith that the first floor of No. 48 was intentionally included in the letter of the 13th of November, 1883. Certainly he never said so until it is said in the defense, which I am looking at now; but he has not said so in his evidence. He has never said that he intended to take that. The argument addressed to me has been this: "The separation of No. 48 and the blue, is effected solely by means of a brick-on-end partition; and that is easily removed." People building brick-on-end partitions do not mean them to be easily removed, unless there is some purpose to remove them, and here, using

the defendant's own evidence on this occasion, at that time the partition was effectually finished, and the defendant knew that the plaintiff intended to reserve it for his own use in his own business. The law being such as I have said, it is not necessary to say anything about how easily you can make holes in a partition, and how you can knock down a partition; you can pull down the front of a house with equal ease if you have proper appliances and proper workmen to do it. The way it is forced on my attention is the reason why the partition was first made, why it was found to be in existence when the defendant first inspected it, why he knew from that time as well as he knows now that it never was the intention of the plaintiff that he should have that "magnificent" room which formed one of two rooms which constituted the business place intended by the plaintiff for his own use, and to which the access was made by one staircase communicating with nothing but the upper room.

But without being certain, as I cannot be certain on the facts before me, whether the mistake was what is called a common mistake—that is, such a common mistake as would induce the court to strike out of a marriage settlement a provision or limitation—that there was to some extent a common mistake I must in charity and justice to the defendant believe, because I cannot impute to him the intention of taking advantage of any incorrect expression in this letter. He may have persuaded himself that the letter was right; but if there was not a common mistake it is plain and palpable that the plaintiff was mistaken, and that he had no intention of letting his own shop, which he had built and carefully constructed for his own purposes.

Upon that ground, therefore, I must say that the contract ought to be annulled. I think it would be right and just and perfectly consistent with other decisions that the defendant should have an opportunity of choosing whether he will submit, as the plaintiff asks that he should submit, to have the lease rectified by excluding from it the first floor of No. 48, whether he will choose to take his lease with that rectification, or whether he will choose to throw up the thing entirely, because the object of the court is, as far as it can, to put the parties into the position in which they would have been if the mistake had not happened.

Therefore I give the defendant an opportunity of saying whether he will or will not submit to rectification. If he does not, then I

shall declare that the agreement is annulled. Then we shall have to settle the terms on which it should be annulled. The plaintiff does not object, if the agreement is annulled, to pay the defendant any reasonable expenses to which he may have been put by reason of the plaintiff's mistake; but it must be limited to that. I should like, if it be convenient for counsel or for the parties, to have an answer to the proposition I have made, in order that that may be fully before the persons whom it interests. I may say that I can find no reason for a reduction of the rent. I listened attentively to what Sir *John Ellis* said, and to what Mr. *Farmer* said, and I cannot but think that the rent of 500 pounds, if the lease is rectified, ought not, with any show of justice, to suffer any reduction.

*Marten,* for the defendant, agreed to strike out the first floor of No. 48 from the lease; the lease in other respects standing as it was executed.

Bacon, V. C. Then the decree will be, the defendant electing to have rectification instead of cancellation of the lease, let the lease be rectified by omitting from it all mention of the first floor of No. 48. Then as to the costs of the action, the plaintiff is not entitled to costs, because he has made a mistake, and the defendant ought not to have any costs, because his opposition to the plaintiff's demand has been unreasonable, unjust, and unlawful.

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## KEISTER v. MYERS.

(Supreme Court of Indiana, 1888, 115 Ind. 312, 17 N. E. 161.)

Mitchell, C. J. . . . The appellants contend, however, that the complaint is insufficient to warrant the reformation of the mortgage, because it does not show the mutuality of the mistake complained of, within the rulings in Allen v. Anderson, 44 Ind. 395, Baldwin v. Kerlin, 46 Ind. 426, and cases of that class.

As has been seen, it was averred in the complaint that the mortgagors agreed to convey the whole tract as a security for the debt, and both parties intended at the time the transaction was consummated that the entire tract should be included in the mortgage, but by mistake of the scrivener, who presumably acted for both, the description was so written as to cover only the undivided one-third. This sufficiently disclosed a mutual mistake, within the rulings in Baker

v. Pyatt, 108 Ind. 61, and McCasland v. Aetna Life Ins. Co., 108 Ind. 130, in which what we regard as the better rule governing the subject under consideration is enunciated. . . .

There is no dispute but that the mortgagee loaned the money, the repayment of which was secured by the mortgage in suit, upon the express agreement that she was to have a mortgage upon the forty-acre tract, as it was called, upon which the mortgagors resided. Keister held the title to the land by two deeds, one from Sophia Lucas and her husband, which conveyed the undivided one-third, the other from Sophia Lucas, administratrix of the estate of Isaiah M. Carter, conveying the undivided two-thirds. When the parties went to the scrivener to have the mortgage prepared, Keister took with him the deed from Mrs. Lucas and her husband, which conveyed the undivided one-third only, and the scrivener followed the description as it was written in that deed.

The latter testified that he read the mortgage over in the hearing of the parties, and that no objection was made to the description. The mortgagee accepted the mortgage, and delivered the money without having observed or understood that the mortgage covered only the undivided one-third. She supposed that it was made in accordance with the agreement. The mortgagors did not testify one way or the other.

The point of the argument on appellants' behalf is, that the evidence entirely fails to show that the mortgagors were mistaken. On the contrary, it is said the evidence shows that they were not mistaken, but that in delivering the mortgage upon the undivided one-third of the land they did precisely what they intended.

This argument proves too much, and, therefore, it proves nothing. Without denying that they agreed to give a mortgage covering the entire tract, and that they received the mortgagee's money with knowledge that she intended to take, and supposed she was receiving, a mortgage corresponding with the agreement, the appellants say they intentionally delivered her a mortgage which only covered the undivided one-third of the land.

A party who admits that an instrument, which a court of equity is asked to reform, does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about, or silently acquiesced in,

discrepancy between the instrument and the agreement as made. Roszell v. Roszell, 109 Ind. 354.

This will be regarded as an attempt merely to shift his position from that of one laboring under an innocent mistake, to that of a person deliberately intending to perpetrate a fraud. No advantage can be gained in a court of conscience by attempting such a change. A court of equity will not permit one party to take advantage and enjoy the benefit of the ignorance or mistake, either of law or fact, of the other, which he knew of and did not correct. Hollingsworth v. Stone, 90 Ind. 244; 2 Pom. Eq. Jur., section 847.

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## WEBSTER v. STARK.

(Supreme Court of Tennessee, 1882, 78 Tenn. (10 Lea) 406.)

COOPER, J. . . . The complainant's bill concedes that he entered into a contract with defendant for two lots, being under the impression that the two lots mentioned in the contract as Nos. 19 and 21 covered the area of lots 17, 19 and 21. And the gravamen of his complaint is, that he made the contract believing that there were only two lots, and that defendant Stark also believed that he was selling him all the ground covered by the three lots, and through mistake described the land as lots 19 and 21. His deposition is that he told Stark he had come to buy the Hinkle mill lot, and the one adjoining it, that he wanted the two lots so that he might have plenty of room. He adds: "I bought the two lots the mill was on, which now by the plat proves to be 17 and 19. I bought them to have the lots my improvements were on." The deposition, it will be noticed, does not sustain the gravamen of the bill, but plainly admits that he only bought two lots, and insists that those lots were 17 and 19 instead of 19 and 21, as inserted in the contract. Unfortunately for this view, the proof is clear that he cleared off the undergrowth, after his purchase, from lot No. 21, and offered to sell that lot to two different persons, asking an advance of $25 on the price he had given, because it was a corner lot.

The testimony of the witness introduced by the complainant, who says he was present when the contract was entered into between the

parties, throws light on the real cause of the difficulty. He testifies: "Webster told defendant Stark he wanted two lots; Stark asked him which lots he wanted, and Webster said he wanted the lot the mill was on, and the one next to it. Webster asked the price, and Stark told him $50 apiece." The testimony of the complainant, the de-defendant, and the witness all agree on the fact that the complainant said that he had come to buy two lots, and two lots were sold him. The complainant and his witness both agree also in the fact that the complainant said he wanted the lot the mill was on and the one next to it. It is obvious that complainant thought that the mill was all on one lot, and he intended to buy that lot. He also wanted the adjoining lot, which might be, upon the supposition that the mill was on No. 19, either lot No. 21 or lot No. 17. The contract specifies lot No. 21, which was a corner lot. The testimony of the witness does not tend to show that lot No. 21 was not the one actually contracted for. Nor does the testimony of the complainant himself, when he details what took place between him and the defendant at the time of the trade. It is only when he comes to express his conclusion from what was done, rather than the facts themselves, that he diverges from the other witnesses. When he says: "I bought the two lots the mill was on, which now by the plat proves to be Nos. 17 and 19," he is not sustained by either his bill or his own statement of the facts. For the bill and the deposition both show that he thought the mill was on one lot, and that he wanted it and the adjoining lot. And other evidence, as we have seen, shows that he took possession of lot 21, cleared and offered to sell it.

The whole difficulty has been occasioned by the fact that the mill, instead of being on one lot alone, was partly on two lots, 17 and 19. No doubt the complainant intended to buy the land on which the mill was situated, and he did buy the lot on which he, and probably the defendant, supposed it was entirely located, and on which it was principally located. If, under this mistake, he selected lot 21 as the adjoining lot and contracted for it, we see no way in which we can correct the mistake by giving him the other lot in lieu. The mistake was not in the contract, or in the writing embodying the contract, but of an extrinsic fact, which fact, if known, would probably have induced the parties to make a different contract. The mistake, such as it was, was the mistake of the complainant, and there is

nothing to fix the defendant with any fault in the premises. The written instrument drawn up by him embodies the contract of the parties exactly as it was entered into. There is no ground for interfering with it in any way.

Affirm the decree with costs.

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## LEGATE v. LEGATE.

(Supreme Court of Illinois, 1911, 249 Ill. 359, 94 N. E. 498.)

MR. CHIEF JUSTICE VICKERS delivered the opinion of the court: . . . The testimony convinces us that it was the intention of Israel Legate to convey to appellant the lots embraced in the Yelton deed in addition to the other real estate which he did, in fact, convey, and that the lots were left out of the deed through a mistake of the scrivener. The only legal question arising under these facts is whether there was a valuable consideration for the conveyance which would entitle the appellant to have the mistake corrected by a court of equity. If the grantor attempted to make a deed to appellant without any valuable consideration and such conveyance was so imperfectly executed as to not accomplish his purpose, a court of equity will not lend its aid to make the gift perfect by reforming the deed. Strayer v. Dickerson, 205 Ill. 257.

Appellee contends, and the court below sustained his contention, that the deed sought to be reformed was voluntary and intended merely as a gratuity because the evidence does not show that there was an antecedent contract to pay for the services rendered to the grantor, and that under the existing circumstances no contract would be implied by law. This court has often held that where members of a family reside together and some of them render services for the others, the presumption of law is, arising from the relation, that such services are rendered gratuitously, and that no recovery can be had for such services without proving an express contract or circumstances from which the law would imply a contract. Miller v. Miller, 16 Ill. 296; Brush v. Blanchard, 18 id. 46; Faloon v. McIntyre, 118 id. 292; Collar v. Patterson, 137 id. 403; Finch v. Green, 225 id. 304.

In the case last above cited the facts were very similar to those in the case at bar. In that case there was an attempt to convey land to

a member of the family who had rendered valuable services to the grantor during a long period of serious illness. There was no evidence of a prior express contract to pay for such services. In discussing that question, this court, on page 312, said: "The evidence. however, justifies an inference of an express contract between the parties when the will was made, or certainly at the time of the execution of the deed. The deed was executed in the presence of appellant and his wife, and it is clear that it was made in consideration of the services rendered and to be rendered and the care and trouble which the grantor had caused to his son and wife. The services rendered were valuable, and at least after the execution of the deed were not rendered gratuitously but with an understanding that the land was to be compensation for them. The services were of such a nature that they could scarcely be measured in money, and it was entirely competent for David Finch to place such a value upon them as he saw fit. His estimate of the value of such services would not be disturbed if the court should differ with him in judgment, nor would the court enter into an inquiry as to the adequacy of the consideration fixed by the parties themselves."

Under the evidence in this case it is clear that Israel Legate was not attempting to bestow a mere gift upon appellant but that he was seeking to compensate her for the valuable services she had rendered to him and to the family. Whether there had been any previous express contract or not, when the deed was executed it constituted a contract, and was, as we have seen, based upon a valuable consideration. This is all that the law requires in order to warrant a court of equity in reforming a contract. Had there been no attempt to execute the deed, a bill for specific performance would stand upon a different footing from one to reform an executed contract. Appellant was entitled to a reformation of this deed.

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## PARTRIDGE v. PARTRIDGE.

(Supreme Court of Missouri, 1909, 220 Mo. 321, 119 S. W. 415.)

Gantt, P. J. . . . Conceding that the description is defective and uncertain, the question arises as to the power of a court of equity to correct this mistake under the facts in evidence in this case. It

is unquestionably true that a mere agreement to give land will not be enforced against the donor upon proof alone of the promise to give, whether the promise be oral or in writing, for the reason that as the obligation rests alone upon the promise of the donor, he may revoke it, and equity will not compel a performance. (Anderson v. Scott, 94 Mo. 637; Brownlee v. Fenwick, 103 Mo. l. c. 428.) But the principle invoked by the defendant Mrs. Partridge in this case is that while a court of equity will not undertake to enforce a mere gratuity, yet where there is a meritorious consideration, as between the grantor and the grantee, a court of equity will take cognizance of the mistake and correct the same. Thus, in Hutsell v. Crewse, 138 Mo. 1, it was ruled that a deed made and delivered by a parent to his minor children for the purpose of making provision for such children has a meritorious consideration that entitled it to the protection of a court of equity. And the deed having been delivered and the land being susceptible of identification *aliunde,* the contract was executed and the title passed. In Crawley v. Crafton, 193 Mo. l. c. 432, the decision in Hutsell v. Crewse, supra, was reaffirmed. And it was explained that the expression used in that case to the effect that "the title passed," meant the title in contemplation of a court of equity was passed; that in such a case the contract was not purely voluntary, and the court did not enforce the executory contract. That the deed was but the evidence of an executed contract founded upon a meritorious consideration and the decree simply corrects the evidence of that contract so as to make it conform to the contract as actually made and executed, and that the deed to the wife was based upon a consideration equally meritorious in the eye of a court of equity. And in support of that ruling this court cited 2 Story's Equity (13th Ed.), 793b; Adams' Equity (8 Ed.), pages 97 and 98, which fully sustained the decision of the court in that case. The evidence in this case leaves no doubt that James M. Partridge, recognizing his obligation to his wife and having no other property than this one-third of this eighty acres of land, sought to make a slight provision for her support in case of his death, and the case is brought clearly within the principle of the authorities above cited. We think the evidence fully justified the decree of the court and upon the clearest principles of equity, the description of the property ought to have been and was properly corrected, and when so corrected, it is evi-

dent that the plaintiffs had no title in equity and justice to any portion of this land, and the decree dismissing their bill was proper, and it is accordingly affirmed.

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## PITCHER v. HENNESSEY.

(New York Court of Appeals, 1872, 48 N. Y. 415.)

EARL, C. . . . On the trial the defendant claimed that, by the terms of the written agreement, the risk in question was assumed by the plaintiff; and that if this was not the true construction of the written agreement, then it did not express the intention of the parties, and should be reformed. After the court had held that this risk under the written contract was not assumed by the plaintiff, and rested upon the defendant, the defendant; (1) for the purpose of procuring a reformation of the contract; and (2) to explain any ambiguity there might be upon the face of said contract, and the meaning of the words "risks of navigation," as understood by the parties, offered to prove "conversations which took place between the plaintiff and defendant before the execution of the written contract between the parties which has been given in evidence. That in such conversations the defendant desired the plaintiff to furnish men and teams at Rome to assist in getting boat and cargo to Martinsburgh, where plaintiff wanted the wheat. The defendant told the plaintiff he knew nothing of the Black River canal or the size of its locks, and inquired of Mr. Pitcher if he knew the size of the locks, and said to him that he, Hennessey, would take no risk as to the length of the locks or the freezing up of the canal, and that plaintiff said he would take those risks." . . .

Parties to an agreement may be mistaken as to some material fact connected therewith, which formed the consideration thereof or inducement thereto, on the one side or the other; or they may simply make a mistake in reducing their agreement to writing. In the former case, before the agreement can be reformed, it must be shown that the mistake is one of fact, and mutual; in the latter case it may be a mistake of the draftsman, or one party only, and it may be a mistake of law or of fact. Equity interferes, in such a case, to com-

pel the parties to execute the agreement which they have actually made. Sometimes it happens that parties agree, as in the case above cited from Peters (Hunt v. Rousmaniere) to carry out their agreement by an instrument which, by their mistake of the law, will not effectuate their intention. In such a case equity will not reform the instrument, or substitute another instrument which will, in law, give effect to their intention, because they adopted and agreed upon the particular instrument, and equity will not compel them to execute an agreement which they never agreed to execute, and thus make an agreement for them. But in this case the parties intended, according to the answer, to reduce their parol agreement to writing, and to embody it in the instrument; and either because they or their draftsman did not understand the force of language, or because some language which they intended should have been inserted in the instrument was omitted by mistake, their intention was not carried into effect, and the instrument failed to embody their agreement.

It is claimed on the part of the plaintiff that if the mistake occurred because both parties misunderstood the meaning of the terms "risk of navigation," both parties believing that these terms would include the risk in question, then no reformation of the contract can be had. This claim is not well founded. When parties have made an agreement, and there is no allegation of any mistake in it, and in reducing it to writing, they, by mistake, either because they did not understand the meaning of the words used, or their legal effect, failed to embody their intention in the instrument, equity will grant relief by reforming the instrument, and compelling the parties to execute and perform their agreement as they made it; and it matters not whether such a mistake be called one of law or of fact. (Oliver v. The Mutual Commercial Ins. Co., 2 Curtis, 277).

Hence I conclude that the learned judge at the circuit erred in excluding proof of the alleged mistake, and in holding that the equitable defense could not be litigated at the trial. I therefore favor a reversal of the judgments, and a new trial, costs to abide event.

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## STAFFORD v. FETTERS.

(Supreme Court of Iowa, 1881, 55 Iowa 484.)

Beck, J. 1. The defendant, being the payee of a negotiable promissory note, transferred it to plaintiff by the following indorsement:

"For value received I assign the within note to James Stafford.
(Signed) H. J. Fetters."

The action was brought at law upon this indorsement. The defendant pleaded an equitable defense, wherein he substantially alleged that by the agreement under which the note was transferred the plaintiff was to take the note without recourse upon defendant, and that the parties adopted the form of transfer as expressing such agreement, and neither of them at the time intended that it should have any other effect than to express the agreement between them, and neither knew that it did have the effect which the law gives to such instruments. Defendant upon this answer, as in a cross-bill, prays that the indorsement be reformed so as to express the true agreement made and intended to be set out by the parties, and that other proper relief be granted. A demurrer to this count of the answer was overruled, and the issues raised by this pleading were tried as an action in chancery. . .

But there is another familiar rule of equity upon which plaintiff relies to defeat the application of these doctrines to this case, namely, relief will not be granted to correct mistakes of law. The rule has no application to mistakes in the language of a contract, or in the choice of the form of an instrument whereby it has an effect different from the intention of the parties. If the parties intending to sell and purchase lands should in ignorance of its legal effect execute a lease, equity would reform the instrument, though it was a mistake of law which led them to adopt it. This mistake, it will be noticed, affects the very contract the parties intended. They intended a deed, but a lease was made. But where two are bound by a bond, and the obligee releases one, mistakingly believing that the other will remain bound, equity will not grant him relief, for the reason that the release is just what he intended it to be; his mistake related to the effect of the contract in matters not contemplated therein. The mistakes of law against which equity will not relieve are those which pertain to the subject of the contract, and were inducements thereto, or considerations therefor. In such cases the parties intended to make the very contracts which they executed, but were induced to make them by a mistake of law. Further illustrations taken from the books make our expression of the rule plainer.

A tenant for life purchased a reversion under the mistake of law that such purchase would cut off the remainder in tail and vest the fee

in him. It was held that he could not have relief. A power of attorney was taken from a debtor as a security; but the debtor died before the power was executed. Equity would not grant relief. In each of these cases the very contracts entered into by the parties were embodied in the instruments. The mistakes were as to the results to be reached which were inducements to the contracts. In the first case the purchaser supposed that the acquisition of the reversion would vest in him the fee simple title. This was the inducement for the purchase. It was a mistake of law. In the second case it was the purpose of the parties to secure the payment of the debt. They mistakenly chose a power of attorney to effect their object. But their purpose was defeated by the law which provides that the death of the grantor revokes a power of attorney. In these cases it will be observed the instruments were of the character intended by the parties. The mistakes pertained to the effect of the instruments upon the rights of the parties, not contemplated by the contracts or provided for therein.

But, on the other hand, when parties enter into an agreement which, through mistake of law or fact, they reduce to writing and the instrument fails to express their true agreement, or omits stipulations agreed upon, or contains terms contrary to the intention of the parties, equity will reform the writing, making it conform to the agreement entered into by the parties. . . .

In the case before us the parties agreed that plaintiff should take the note without recourse on defendant. They mistakenly supposed that the form of assignment of the note would have that effect, being ignorant of the provisions of the law of commercial paper which makes the indorser liable in case of default of the maker of the note. This was a mistake of law, but it pertained to the instrument itself, and by reason of it the writing does not express the true agreement of the parties. Equity will reform it.

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## PARK BROS. & CO., LIMITED, v. BLODGETT & CLAPP CO.

(Supreme Court of Connecticut, 1894, 64 Conn. 28, 29 Atl. 133.)

Torrance, J. . . . The finding of the court below is as follows: "The actual agreement between the defendant and the plaintiff was

that the plaintiff should supply the defendant, prior to January 1st, 1890, with such an amount of tool steel, not exceeding fifteen tons, as the defendant's wants during that time might require, and of the kinds and upon the terms stated in said contract, and that the defendant would purchase the same of the plaintiff on said terms. But by the mutual mistake of said Church and said Clapp, acting for the plaintiff and defendant respectively, concerning the legal construction of the written contract of December 14th, 1888, that contract failed to express the actual agreement of the parties; and that said Church and said Clapp both intended to have the said written contract express the actual agreement made by them, and at the time of its execution believed that it did." No fraud is properly charged, and certainly none is found, and whatever claim to relief the defendant may have must rest wholly on the ground of mistake. The plaintiff claims that the mistake in question is one of law and is of such a nature that it cannot be corrected in a court of equity.

That a court of equity under certain circumstances may reform a written instrument founded on a mistake of fact is not disputed; but the plaintiff strenuously insists that it cannot, or will not, reform an instrument founded upon a mistake like the one here in question which is alleged to be a mistake of law. The distinction between mistakes of law and mistakes of fact is certainly recognized in the text books and decisions, and to a certain extent is a valid distinction; but it is not practically so important as it is often represented to be. Upon this point Mr. Markby, in his "Elements of Law," section 268 and 269, well says: "There is also a peculiar class of cases in which courts of equity have endeavored to undo what has been done under the influence of error and to restore parties to their former positions. The courts deal with such cases in a very free manner, and I doubt whether it is possible to bring their action under any fixed rules. But here again, as far as I can judge by what I find in the text books, and in the cases referred to, the distinction between errors of law and errors of fact, though very emphatically announced, has had very little practical effect upon the decisions of the courts. The distinction is not ignored, and it may have had some influence, but it is always mixed up with other considerations which not infrequently outweigh it. The distinction between errors of law and errors of fact is therefore probably of much less importance than is commonly supposed. There is some

satisfaction in this because the grounds upon which the distinction is made have never been clearly stated."

The distinction in question can therefore afford little or no aid in determining the question under consideration. Under certain circumstances a court of equity will, and under others it will not, reform a writing founded on a mistake of fact; under certain circumstances it will, and under others it will not, reform an instrument founded upon a mistake of law. It is no longer true, if it ever was, that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is whether it is such a mistake as a court of equity will correct; and this perhaps can only or at least can best be determined by seeing whether it falls within any of the well recognized classes of cases in which such relief is furnished. At the same time the fundamental equitable principle which was specially applied in the case of Northrop v. Graves, 19 Conn., 548, may also, perhaps, afford some aid in coming to a right conclusion. Stated briefly and generally, and without any attempt at strict accuracy, that principle is, that in legal transactions no one shall be allowed to enrich himself unjustly at the expense of another, through or by reason of an innocent mistake of law or fact entertained without negligence by the loser, or by both. If we apply this principle to the present case, we see that by means of a mutual mistake in reducing the oral agreement to writing the plaintiff, without either party intending it, gained a decided advantage over the defendant to which it is in no way justly entitled or at least ought not to be entitled in a court of equity.

The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by reason of a mutual mistake, made, as we must assume, innocently and without any such negligence on the part of the defendant as would debar him from the aid of a court of equity; the rights of no third parties have intervened; the instrument if corrected will place both parties just where they intended to place themselves in their relations to each other; and if not corrected it gives the plaintiff an inequitable advantage over the defendant. It is said that if by mistake words are inserted in a written contract which the parties did not intend to insert, or omitted which they did not intend to omit, this is a mistake of fact which a court of

equity will correct in a proper case. Sibert v. McAvoy, 15 Ill., 106. If then the oral agreement in the case at bar had been for the sale and purchase of five tons of steel, and in reducing the contract to writing, the parties had by an unnoticed mistake inserted "fifteen tons" instead of "five tons," this would have been mistake of fact entitling the defendant to the aid of a court of equity. In the case at bar the parties actually agreed upon what may, for brevity, be called a conditional purchase and sale, and upon that only. In reducing the contract to writing they, by an innocent mistake, omitted words which would have expressed the true agreement and used words which express an agreement differing materially from the only one they made. There is perhaps a distinction between the supposed case and the actual case, but it is quite shadowy. They differ not at all in their unjust consequences. In both, by an innocent mistake mutually entertained, the vendor obtains an unconscionable advantage over the vendee, a result which was not intended by either. There exists no good substantial reason as it seems to us why relief should be given in the one case and refused in the other, other things equal. . ... .

Upon principle then we think a court of equity may correct a mistake of law in a case like the one at bar, and we also think the very great weight of modern authority is in favor of that conclusion.

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## MACOMBER v. PECKHAM.

(Supreme Court of Rhode Island, 1889, 16 R. I. 485, 17 Atl. 910.)

In this case the oral testimony is offered to show that the defendant agreed by word of mouth to sell and the complainant to purchase a certain tract of land, and that, in consequence of a mutual mistake, the agreement as reduced to writing and signed did not include the whole of it; and the question is whether the testimony is admissible to show this, in order that the contract may be reformed so as to include the land omitted, and be specifically enforced as reformed. We think it is not admissible for these purposes both on reason and the greater weight of authority. The court, if it were to receive the testimony and use it as proposed, would virtually substitute the original oral agreement for the written contract, and enforce it in spite of the statute, which declares that no action shall be brought to charge any person

on any such agreement. What right has the court to do this? It is argued that the statute was not intended to abridge the ordinary chancery jurisdiction in matters of mistake. But why not, if the language imports that it was? We have not found this question answered in any of the cases. The great names of Kent and Story are invoked in support of the jurisdiction. Kent and Story say there is no reason why oral testimony should not be received as readily when offered by the complainant to reform the written contract, and enforce it when reformed, as when offered by the defendant to defeat its enforcement. This may be so when the written contract is not within the statute of frauds; but when the contract is within the statute the difference between receiving oral testimony, when offered for the purpose of varying the contract and enforcing it as varied, and receiving it, when offered for the purpose of showing that the contract as written is not what was agreed to and defeating the enforcement, is the difference between doing what is forbidden by the statute and doing what is not forbidden, as was clearly explained in Clinan v. Cooke, supra, and as has been recognized by Story himself. 2 Story, Eq. Jur., sec. 770. The remarks of Kent and Story seem to have been directed against the doctrine of the English chancery courts, which, as we have seen, is applied to all written contracts, whether within the statute or not, and it does not appear that in making them they gave thought to the distinction enacted by the statute.

It is said that it is hard for the complaining party not to have, on proof of the mistake, the same relief which he could have had if no mistake had occurred. Doubtless this is true, but it would also have been hard for him not to have had the original oral agreement specifically enforced, without any attempt to put it in writing, if relying on the honor of the person with whom he agreed, he had implicitly trusted that it would be carried out, and had been deceived. There would have been disappointment in both cases, but nothing more than disappointment in either, unless, in consequence of his trust, he had changed his situation for the worse, and this he might have done in either case. Such disappointments are the natural effect of the statute. The purpose of the statute is to avoid the frauds and perjuries, the uncertain and erroneous recollections, and the misunderstandings, which are incident to unwritten contracts by making them incapable of enforcement; and therefore, when a court receives oral testimony for the

purpose of showing that, by reason of mutual mistake, the contract, as reduced to writing is not the contract agreed upon by word of mouth, and of having the latter enforced upon proof thereof, it, to that extent, invites the evils which the statute was intended to suppress. The complainant contends that the testimony should be received because it will show that the contract can be reformed, as he desired to have it reformed, by striking out certain words in it as well as by adding others to it. We think, however that, if the effect of the change is to enlarge the scope of operation of the contract, it does not matter whether the change is made by striking out words or adding them; for, in either case, the contract will not be the contract which the defendant signed, and will be more burdensome to him. Our conclusion is that the oral testimony is not admissible for the purpose for which it was offered.

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## NOEL'S EX'R v. GILL.

(Supreme Court of Kentucky, 1886, 84 Ky. 241, S. W. 428.)

JUDGE BENNETT. . . . The proof is also clear that appellant intended to, and did sell to said company, all of the lots on which its road-bed was constructed, in whole or in part, but no more. It is also clear that the deed made by appellant to said company does not embrace, by mistake in the draftsman, all of the lots sold. This mistake evidently grew out of the fact that neither party knew the identity or quantity of the property sold.

The lower court, upon these facts, attempted to reform the deed, so as to make it conform to the terms of the contract made between these parties, by decreeing that appellee, the Louisville & Nashville Railroad Company was entitled to the four lots, Nos. 6, 7, 8 and 9.

Appellant has appealed from that judgment. The first question presented is, had the court the power to reform the deed, and make it conform to the terms of the contract? That question being decided affirmatively, the second question is, did the lower court reform the deed on equitable principles to both parties?

All mistakes occurring in agreements, executed or executory, relate either, first, to the terms of the contract, or, second, to the subject-matter of the contract. The terms of the contract may be stated ac-

cording to the intention of the parties, but there is an error of one or both in reference to the property to which the terms apply—such as a mistake in reference to its identity, situation, boundaries, title, quantity or value.

Here the terms of the contract were, the sale to appellee's vendor of all the lots owned by appellant, on the north side of Main Cross street, over which the road-bed was constructed in whole or in part. The mistake occurred in reference to the identity, location and number of lots included in the terms of sale.

The appellant's attorney suggests that, although the mistake may exist as to the subject-matter of the contract, yet as the statute of frauds requires the contract to be in writing, parol evidence can not be heard to correct the mistake, because that would be virtually making a contract by parol evidence that the statute of frauds required to be in writing.

The courts of a few of the States have held that contracts required by the statute of frauds to be in writing could only be corrected in the single instance of a mistake in reference to the subject-matter of the contract, where the error consisted in including more, for instance, land, in the written contract, than the parties intended, in which case parol evidence might be used to show that the surplus should be omitted or eliminated from the contract as written, and confine the operation of the contract to the remaining subject-matter mentioned in it, and to which the parties intended the contract to apply. The reason assigned for thus limiting the reformation of a contract required by the statute of frauds to be in writting is, that parol evidence in that case does not conflict with the statute of frauds, since the relief does not make a parol contract required by the statute of frauds to be in writing but simply narrows a written one already made.

The courts of the States that have put the most stress on this doctrine had no general equity jurisdiction, but only such limited equity jurisdiction as the statutes of the State conferred upon them. This view of the question, therefore, grew out of that fact, A few other States, however, with general equity jurisdiction, followed in the same line of thought.

On the other hand, the courts of a large majority of the States have held that contracts required by the statute of frauds to be in writing may be reformed by courts of equity, so as to enlarge or restrict the

terms or the subject-matter of the contract whenever it is clearly shown that the written contract, by fraud or mistake, does not embrace either the terms or the subject-matter of the contract, as it was intended and understood by the parties to it.

The courts of equity go upon the ground that the statute of frauds is no real obstacle in the way of administering equitable relief, so as to promote justice and prevent wrong. They do not overrule the statute, but, to prevent fraud or mistake, confer remedial rights which are not within the statutory prohibition. In respect to such needful remedies, the statute as to them "is uplifted." It has also been said, that in case of a written conveyance of land, which does not convey as much land as was agreed, or different or more land than was intended by the parties, the court will fasten a personal obligation upon the party benefited by the mistake to correct it, upon the ground that he was holding the property as trustee.

Whether the parol evidence offered to correct the writing on account of fraud or mistake shows the verbal contract to be broader than the written instrument—covering more or a different subject-matter, or enlarging the terms—or is narrower than the written instrument, either in the terms or subject-matter of the contract, courts of equity will grant relief by reforming the contract, so as to prevent fraud or mistake. The statute of frauds, in granting such relief, is not violated, but is "uplifted," that it may not perpetrate the fraud that the Legislature designed it to prevent. . . .

We think the court did right in reforming the deed to make it conform to the contract of the parties.

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## SHERWOOD v. SHERWOOD.

(Supreme Court of Wisconsin, 1878, 45 Wis. 357.)

Lyon, J. . . . 1. An extended examination of the cases and authorities bearing on the question, not only those cited by both of the learned counsel, but many others not cited, has satisfied us that it is not a proper exercise of the powers of a court of equity to reform a will by adding provisions thereto to make the will accord with the real intentions of the testator.

We have seen but a single case in which a court has assumed to correct a mistake in a will. That is the case of Wood v. White, 32 Me., 340. The will contained this bequest: "I give to J. Wood, of Belfast, the whole amount, principal and interest, he may owe me at the time of my decease, which is secured to me by mortgage," etc. The facts were, that no person named J. Wood owed the testator, or ever had any dealings with him, or claimed the legacy. The complainant, George Wood, of Belfast, was married to the testator's niece, was his warm personal friend, and owed him a debt secured by mortgage. The executors, who were the defendants in the action, answered admitting that the testator intended George instead of J. Wood, and did not contest the action. Besides, it appeared that the testator, when abroad, had addressed letters to the complainant by the name of J. Wood. On these facts the courts decreed that the will be corrected. The opinion contains neither argument nor reference to authority, and the case cited to support the decree do not support it. The case was a proper one for construing the will as containing a legacy to George Wood; but the decision is of little value as authority for reforming wills.

Judge Story says, in a general way, that courts of equity have jurisdiction to correct wills; but it is apparent from his discussion of the subject and the cases which he cites, that he does not mean that the court will reform and change the language of a will, but that it will carry out the intention of the testator in a proper case by giving construction to the words of the will in accordance with such intention. He says: "In regard to mistakes in wills, there is no doubt that courts of equity have jurisdiction to correct them when they are apparent on the face of the will, or may be made out by a due construction of its terms; for in cases of wills the intention will prevail over the words. But then the mistake must be apparent on the face of the will, otherwise there can be no relief." . . .

The reason why courts of equity will not interfere in such cases seems to be, that an action to reform a written instrument is in the nature of an action for specific performance, and the making of a will being a voluntary act, there is no consideration, as in actions to reform deeds or contracts, to support the action. Hence it is said in a note by the editor of Wigram's treatise on extrinsic evidence in aid of wills, that "volunteers under wills have no equity whereon to found a suit for specific performance." O'Hara's 2d Am. ed. 47.

There is another reason why a court of equity should not reform a will by correcting a mistake therein, after the will has been admitted to probate. Such probate is the judgment of the court that the instrument, just as it is written, is the last will and testament of the testator; and on well settled principles that judgment cannot be attacked collaterally. While the judgment of the proper court admitting the will to probate remains in force, no court is authorized, in the absence of fraud, to adjudge that the instrument, or any of its provisions, is not the will of the testator. Neither can it add provisions not written in the will. It can only construe the instrument as it is written.

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## POTTER v. POTTER.

(Supreme Court of Ohio, 1875, 27 O. St. 84.)

Day, J. The original action was brought by the plaintiff against the defendant, to recover the balance due on a promissory note. The defendant answered that the note in suit was the only one remaining unpaid of several notes given by the defendant's testator to the plaintiff for a farm; and she avers that said notes were, by mistake, given for five hundred dollars too much, and asks to have the mistake corrected. The plaintiff replied, denying the mistake. This was the issue to be tried, and the case having been appealed to the District Court, was, by that court, decided in favor of the defendant, and a decree correcting the mistake was rendered accordingly.

The plainitiff filed a motion for a new trial, on the ground that the finding of the court was against the law and the evidence.

The motion was overruled, and a bill of exceptions embodying all the evidence was taken.

To reverse the judgment rendered by the District Court in favor of the defendant, the plaintiff took the case, by petition in error, to the Supreme Court.

The question for our determination, then, is whether the District Court erred in finding upon the evidence that there was a mistake in the amount specified in the notes in cóntroversy.

This question, under a well-settled rule, applicable to the review of facts on error, can not be affirmatively answered, unless the finding

was manifestly unwarranted by the evidence. But, in determining whether the finding is supported by the evidence, reference must be had to the character of the issue to be tried, and the degree of evidence required by law to warrant an affirmative finding.

When the reformation of a written instrument is sought on the ground of mistake, the presumption is so strongly in favor of the instrument, that the alleged mistake must be clearly made out by proofs entirely satisfactory, and nothing short of a clear and convincing state of fact, showing the mistake, will warrant the court to interfere with and reform the instrument. This principle rests upon the soundest reason and upon undisputed authority, and if not adhered to by the courts, or when plainly disregarded, is not enforced by reviewing courts, the security and safety reposed in deliberately written instruments will be frittered away, and they will be left to all the uncertainty incident to the imperfect and "slippery memory" of witnesses.

The evidence produced by the parties was conflicting, and, viewed in the light of the corroborating circumstances, leaves the mind, to say the least, doubtful of the existence of the mistake alleged. It is quite manifest that the mistake was not made out by the clear aand convincing proof which the law requires to warrant the finding of a mistake in the instruments in controversy.

This case is distinguishable from that of Clayton and wife v. Freet et al., 10 Ohio St. 544, where the evidence was such as to leave the mind impressed with the belief that the alleged mistake existed, and the doubt arose only as to whether it was proven with sufficient clearness. In such a case, the court held the judgment based on the finding of the mistake should not be reversed on error. But in this case, the doubt arises, not only as to whether the mistake was proven with sufficient clearness, but as to whether it should be regarded as proved at all, by a fair preponderance of the evidence. However this may be, we think it is manifestly clear, from the evidence, that the court disregarded the rule of law requiring clear proof, and its finding can be sustained only upon the supposition that it regarded the law as requiring nothing more than a mere preponderance of evidence to warrant a finding in favor of the alleged mistake. We think, therefore, that the court erred in applying the law to the facts of the case, and for that reason should have granted the motion for a new trial. Judgment reversed and cause remanded.

## PARISH v. CAMPLIN.

(Supreme Court of Indiana, 1894, 139 Ind. 1, 37 N. E. 607.)

McCabe, J. . . . The principal controversy is over the first conclusion of law stated, to the effect that the appellee Camplin is entitled to a reformation of the deed. It is contended by appellants that because the names of Mary Goodwine and her husband were left out of the body of the deed, it was no deed at all as to her, and it could not be reformed, and they cite Cox v. Wells, 7 Blackf. 410, in support of that proposition. It was held in that case, and we think correctly, that a deed tendered under a contract to execute a deed with relinquishment of dower, which did not contain the name of the wife in the body of the deed was insufficient. But there was no claim of mistake in that case, and no attempt at reformation. The other cases cited by appellants have no application here.

It is contended by appellants that the deed of a married woman can not be reformed on account of a mistake, except as to a matter of mere description of the premises intended to be conveyed, and they cite a large number of cases in this court to the effect that equity affords no relief against such a mistake. Hamar v. Medsker, 60 Ind. 413; Carper v. Munger, 62 Ind. 481; McKay v. Wakefield, 63 Ind. 27; Wilson, Admr., v. Stewart, 63 Ind. 294; Baxter v. Bodkin, 25 Ind. 172; Shumaker v. Johnson, 35 Ind. 33; Behler v. Weyburn, 59 Ind. 143; Dunn v. Tousey, 80 Ind. 288; Travellers' Ins. Co. v. Noland, 97 Ind. 217. But none of these cases holds that a married woman's deed can not be reformed for other mistakes than those of description of the premises intended to be conveyed.

If the deed of a married woman may be reformed on account of a mistake in the description of the premises or estate, or interest intended to be conveyed, as is decided in the cases cited, no good reason is perceived why it may not be reformed as to other mistakes therein. This is not a case like Baxter v. Bodkin, 25 Ind. 172; Stevens v. Parish, 29 Ind. 260, and other cases referred to by appellants' counsel where the defect in the conveyance sought to be cured was the failure of the husband to join in the deed of his wife. Such a defect can not be cured either by equity or by the voluntary action of the husband

in the execution of another separate deed on his part to the same person for the same premises as those contained in the wife's deed. The reason of this is that the statute provides that the "wife shall have no power to encumber or convey such (her) lands except by deed in which her husband shall join." 3 Burns' R. S. 1894, section 6961; R. S. 1881, section 5116. Those cases correctly hold that on account of that statute the separate deed of the wife is absolutely void. If the instrument is absolutely void, it is as if it never had been written, or signed. In that case to reform it would be to make a deed for her, by a court of equity, that she never made, and no part of which she ever made.

Here the defect does not arise out of the fact that the attempted conveyance was one which a statute expressly forbids, and renders therefore absolutely void. The attempted conveyance was in all respects lawful had the contract been carried out without the intervention of a mistake. It has been held by this court that a mistake in a deed of a married woman may be reformed so as to make it conform to the intention of the parties thereto, and that such reformation is not the making of a new contract by the court for her, which she herself has not made, as contended by the appellants. Styers v. Robbins, 76 Ind. 547; Comstock v. Coon, 135 Ind. 640. The cases on the subject of reformation as to the description of the estate or interest intended to be conveyed, already cited above, fully justify the conclusion of law that the deed ought to be reformed so as to make it a conveyance of the undivided four-fifths. And even though the parties may have known that the deed read three-fifths instead of four-fifths, those cases hold that it would constitute a mistake of facts, and not a mistake of law, if the parties really thought the deed sufficient to convey the four-fifths, and would entitle the appellee Camplin to a reformation in that respect. The finding is that they did all so believe.

But it is contended, with much zeal and ability on behalf of appellants, that the omission of the names of Mary M. Goodwine and her husband from the body of the deed rendered it a mere nullity as to them, and hence there could be no reformation as to them; and to reform the deed in that respect would amount to the making of a contract or deed for Mrs. Goodwine and her husband which they never themselves made.

Many authorities are cited to the effect that the grantor's name must be in the body of the deed, or it will be void. We do not stop to determine whether that is the legal effect of leaving out of the body of the deed the name of the grantor or not; if it was competent and proper to reform the deed so that the names of the Goodwines would appear therein, as was done, that is sufficient to uphold the judgment of the trial court.

That question has been settled by this court against appellants, in Collins v. Cornwell, 131 Ind. 20. In that case a married woman had undertaken to mortgage her real estate for money borrowed by herself. Her husband joined with her in the execution of the mortgage, but his name nowhere appeared in the body thereof, and appeared only where he signed it with his wife and in the certificate of acknowledgment by the notary public, just as in the case at bar. The mortgage was reformed on the ground that the husband's name had been omitted by the mutual mistake of all the parties. See, also, Calton v. Lewis, 119 Ind. 181.

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## SHROYER v. NICKELL.

(Supreme Court of Missouri, 1874, 55 Mo. 264.)

SHERWOOD, J. . . . The reformation of deeds and of contracts, whether sealed or otherwise, executed or merely executory, is one of the most familiar doctrines pertaining to equity jurisprudence. But it is to be observed of this power of reforming instruments, that it always has for its basis the fact that the parties thereto are capable of making a valid contract. This capability cannot be, in general, affirmed of a married woman. The only exception to this rule of incapacity, so far at least as it concerns her individual rights, is where a feme covert contracts with regard to her separate estate; for in respect to that, she is held a feme sole by courts of equity. But beyond this, the original inability to make a binding contract still exists in all its ancient vigor, save where modified by statute. It was one of the fundamentals of common law, that the contract of a feme covert was absolutely void, except where she made a conveyance of her estate by deed duly acknowledged, or by some matter of record; and this

could only be done after private examination as to whether such conveyance was voluntarily made; and our statutory mode, whereby the deed of a married woman is executed and acknowledged, is but substitutionary of the common law method in this regard. This is the only change that our statute has wrought.

It follows as an inevitable sequence from these premises, that, aside from the exceptional case above noted, a feme covert is utterly incapable of binding herself by a contract to convey her land, either at law or in equity, except by compliance with the prescribed statutory forms. An attempted contract on her part is not such compliance, nor is her disappointed intention to convey clothed with those forms.

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## MILLS v. LOCKWOOD.

(Supreme Court of Illinois, 1866, 42 Ill. 111.)

Breese, J.—This was a bill in chancery, exhibited in the Marshall Circuit Court by Ralph Lockwood against Elisha S. Mills and others, to reform a deed and to enjoin proceedings in an action of ejectment, brought by the defendants against complainant. . . .

On the point of laches, in not resorting to this remedy at an earlier period, the answer is, the statute of limitations has not run against the complainant, and he has been, all the time since his purchase, in the peaceable possession of the lands. He was in no position to act; he could only be quiet, awaiting the attack of those who supposed they had paramount title. In such case, the lapse of time is not material. So soon as the heirs at law of Cephas Mills brought their action of ejectment and recovered a verdict, then complainant filed this bill alleging the mistake, and seeking to correct it. He had no motive to move before he was molested. If there be any laches, is it not rather imputable to the heirs, who slumbered on their rights, if they had any, so many years? It is not understood that a statute of limitations, or rule of limitation in equity, runs against a possessor of real estate, but it runs against him who is out of possession. Barbour v. Whitlock, 4 Monroe, 197.

The case of Lindsay v. Davenport, 18 Ill., 381, is like this, only that the mistake was corrected in favor of the grantor after the lapse

of twenty-two years, he all the time having remained in possession of the tract he had by mistake included in his deed, and no rights of third parties had intervened.

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## BREEN v. DONNELLY.

(Supreme Court of California, 1887, 74 Cal. 301, 15 Pac. 845.)

McFarland, J. This is an action to reform a deed. . . .

This case has been argued by counsel for appellants upon the theory that there should be applied to it the rule that where coterminous owners of land establish a boundary line between them, and acquiesce in its correctness during the period of statutory limitation, such line can not afterward be disturbed. Such is certainly the general rule in actions of ejectment to quiet title, etc., although it is, perhaps, not definitely settled to be the rule, even in those cases, when there has been a mutual mistake. (See Sheils v. Haley, 61 Cal. 157, and Smith v. Robarts, 8 West Coast Rep. 503.) But this is an action to reform a deed,—to correct a mistake in a written instrument and make it conform to the real intent of the parties. That a court of equity has power to correct such a mistake, in a proper case, is, of course, beyond doubt, and that the facts here make a proper case is equally clear. It is established beyond doubt that the two tenants in common intended to convey by deed to each other the half of a tract of land, and that by pure mistake the deed sought to be reformed failed to convey such half. There is no question here of innocent purchasers. Neither are there any equities by reason of defendants having put any improvements on the land not included in the deed. They have had the benefit of the use of the land for pasturage since the date of the deed, and have not expended upon it any money whatever. In good conscience they ought to correct the mistake; and their only defense is founded upon the naked plea of the statute of limitations.

But we think that the action was commenced in time. Section 338 of the Code of Civil Procedure enumerates the kinds of actions which must be commenced within three years; and subdivision 4 of said section is as follows:

"An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed *to have accrued* until

the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

In the case at bar, the discovery of the mistake was not made until 1880, at which time the cause of action "is deemed to have accrued." The action was commenced in less than two years afterwards. It was therefore commenced in time, unless the circumstances were such that plaintiff ought to have known the mistake, and therefore should be held in law to have had knowledge of it before the time of its actual discovery. But we think that there were no circumstances from which he should be charged with such knowledge. After the partition line had been run by a surveyor believed to be competent and honest, and who had been specially employed for that purpose, there was nothing to excite the suspicion of either party that such line did not divide the rancho into two equal parts. Looking at, or walking or riding over, or using for grazing purpose, a tract of land containing over twenty-four thousand acres, would not indicate to any one that it was five hundred acres more or less than the half of another tract containing over forty-eight thousand acres.

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## KINNEY v. ENSMENGER.

(Supreme Court of Alabama, 1889, 87 Ala. 340, 680, 6 So. 72.)

SOMERVILLE, J. The bill is filed by the appellee, Ensmenger, to reform a land deed recently executed to the appellants, and also the notes given for the purchase money, so as to make the papers show on their face that a vendor's lien was retained in accordance with what is alleged to have been the mutual agreement between the contracting parties. An injunction was prayed and granted, staying the threatened sale of the land in the meanwhile; it appearing that the purchase-money notes were not yet due, and that the defendants were insolvent. . . . If the facts alleged in the bill are true, the case is clearly brought within the jurisdiction of chancery under the equity head of reformation of written instruments on the ground of mistake or fraud, unless the failure of the complainant to inform himself as to the contents of the deed and notes be such culpable negligence as to bar him of his remedy in a court of conscience. The bill avers a distinct agreement between the parties that the deed and notes should show on

their face a retention of a vendor's lien, and that the omission of this stipulation from these papers was through the fraudulent collusion of the defendants and one Harrison, who, as real-estate agent, negotiated the sale as attorney in fact of the complainant. . . .

The complainant's illiteracy and inability to understand the English language, coupled with his probable confidence in his trusted agent, Harrison, who acted for him in negotiating the sale, are prima facie sufficient, under the facts of this case, to acquit him of such culpable negligence in failing to be informed as to the contents of the deed and notes as would prevent him from obtaining relief in a court of equity. The bill is not wanting in equity, and there was no error in refusing to dissolve the injunction on this ground. The demurrer to it also was correctly overruled.

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## PALMER v. HARTFORD INS. CO.

(Supreme Court of Connecticut, 1887, 54 Conn. 488, 9 Atl. 248.)

Suit for the reformation of a policy of fire insurance and for the recovery of the amount due on the policy when reformed; brought to the Superior Court in New London County.

PARDEE, J. The complaint in this case is in effect as follows: Prior to May 15th, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise; on that day it expired; on that day the defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy, the plaintiffs accepted the proposition; the defendant wrote a policy, delivered it to, and received the premium from the plaintiffs; they, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it. The merchandise was damaged by fire on August 17th, 1884; subsequently the plaintiffs for the first time discovered that the last policy contained this condition, which was not in the first. "Co-insurance clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly." In this respect the last

policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and if the defendant had notified them of its refusal to perform its agreement, they could and would have obtained elsewhere, at the same price, the desired insurance upon the stipulated terms. The defendant refuses either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement and pay the indemnity promised by it. The defendant answers by demurrer, assigning therefor the following reasons: "That upon the facts stated the plaintiffs are not entitled to the relief sought; that the complainant does not aver that there was a mutual mistake between the parties as to the terms of the policy or as to the agreement for one; and that the plaintiffs were guilty of gross laches in not reading the policy, and in not notifying the defendant of their claim, so that it might have exercised its right of rescission before loss. . . .

It is a matter of common knowledge that a policy of insurance against fire, at the present day, is a lengthy contract, which, after specifying the main things, namely, the subject, its location, the owner, the amount, the time and the price, embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring indemnity against loss applied to the underwriter and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and when he receives the policy he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnishes justification for omission to read them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written draft of all the terms, conditions and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises

to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained, the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not for his pecuniary advantage to impute it to another as gross negligence, that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has inducted the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared; but we think that in few or none of these did the party seeking to enforce it subject himself to this limitation.

There was in the first written draft agreed upon by the plaintiffs and defendant the contract between them; in all its terms and conditions it became, and has hitherto continued to be operative. The draft of another and variant one has not annullel or affected it, because the last has not in the eye of the law been accepted by or become obligatory upon the plaintiffs. That contract the defendant had the right to rescind,—a right which it has possessed in its fullest measure because it was not affected by the delivery of the variant one, not accepted by the plaintiffs; and if, because of its own negligence in omitting to execute and deliver a true copy of the original agreement, it resulted that it was inducted to refrain from exercising its right of rescissioin, it must accept the consequences rather than cast the burden upon the plaintiffs.

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## GILMORE v. THOMAS.

(Supreme Court of Missouri, 1913, 252 Mo. 147, 158 S. W. 577.)

Roy, C.—This is a proceeding to quiet the title to twenty acres, the west half of the southwest quarter of the northwest quarter of

section 28, township 30, range 23, in aid of which an injunction was issued to prevent defendant from cutting timber from the land pending the suit. . . .

It is conceded that the land was misdescribed in the will. It was also misdescribed in the executor's deed to Sterling E. Gilmore. Regardless of the mistake in the will, the executor's ded did not, to say the least of it, convey the legal title to Sterling, for the simple reason that it did not describe the land, but instead described land six miles away. Whatever right either plaintiff or defendant may have under that deed is an equitable right and not a legal one. We will examine the claim of each to an equitable interest in the land under the executor's deed.

1. The plaintiff claims that he furnished the money, sixty dollars, to pay for the land; and that the deed was made to Sterling under an arrangement between them that Sterling was to convey it to the plaintiff. In other words, the plaintiff asks that the conveyance to Sterling be upheld, but that Sterling's grantees be adjudged to hold the land in trust for the plaintiff. The trouble with the plaintiff is that, not having clean hands in that matter, he cannot get into a court of equity to have such a trust declared. He was executor of the will; and as such he had no lawful right to purchase the land of the estate directly or indirectly. . . .

The doctrine that he who comes into a court of equity must come with clean hands may be invoked by this court on its own motion. (Creamer v. Bivert, 214 Mo. 1. c. 485.) We, therefore, decline to enforce any equity plaintiff may claim to hold under the sale to Sterling E. Gilmore.

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## STEINBACH v. RELIEF FIRE INS. CO.

(Court of Appeals of New York, (1879) 77 N. Y. 498.)

Earl, J. In October, 1865, the defendant, a New York corporation issued to the plaintiff at Baltimore, Maryland, a policy of insurance against fire on his "stock of fancy goods, toys, and other articles in his line of business, contained in his store, occupied by him as a German jobber and importer." . . .

In February, 1869, the plaintiff commenced an action against the defendant, to recover upon the policy for such loss, in the Superior Court of the city of Baltimore. The defendant appeared in that action and procured the removal thereof to the Circuit Court of the United States. The action was subsequently tried in the latter court, the defense being that the keeping of fire-works was a breach of the policy. The court held that the terms of the policy prohibited the keeping of fire-works, and rejected proof offered by the plaintiff to show that fire-works constituted an article in the line of business of a "German jobber and importer," and judgment was given for the defendant. The plaintiff then took the case, by writ of error, to the Supreme Court of the United States, and there the judgment was affirmed. . . .

Now the plaintiff has commenced this action to reform the policy by inserting therein permission to keep fire-works, on the ground that such permission was omitted from the policy by mistake, and to recover upon the policy as thus reformed. He has thus far been defeated, on the ground that the judgment in the United States Court is a bar to the maintenance of this action, and whether it is or not is the sole question for our determination.

Whatever was necessarily determined in that action concludes the parties, and can never again be brought into litigation between them, so long as the judgment therein remains in force. That is the universal rule always applied, no matter how much injustice may be done in a particular case. Such a rule of law, which generally tends to justice, cannot be changed to meet the exigencies of a case where a different rule would work out juster results.

In order to bring a case within the rule, the second suit must be founded substantially upon the same cause of action as the first; and the test of that is that the same evidence will support both actions; and the rule is the same, although the two actions are different in form: (Gregory v. Burrall, 2 Edw. Ch., 417; Rice v. King, 7 J. R., 20; Johnson v. Smith, 8 id., 383.) And it matters not that the former action was decided upon erroneous grounds: (Morgan v. Plumb, 9 Wend., 287.)

Here there was but one contract of insurance, and the cause of action in the Baltimore suit, as in this, was founded on that. In that suit the plaintiff sought to recover by proving that he was permitted

to keep fire-works. By the same proof he seeks to recover in this. There he sought to prove the permission by parol. Here he seeks preliminarily to have the writing reformed, so that he can prove it by the writing. If he could succeed here, he would in some form have to prove precisely what he offered to prove there, to wit, that he was permitted to keep fire-works. If the plaintiff could succeed in reforming this contract, it would not change its scope or effect. It would, according to the decisions in this State, be the same contract still. The only change would be that the plaintiff would have direct written proof of what, without such reformation, would rest upon construction and inference based upon other provisions in the contract, and upon parol evidence. The contract would then be, in its legal effect, the same as that the plaintiff sought to enforce in the former suit.

It is admitted by the plaintiff that the judgment against him in the former action is a bar to any recovery in this, unless he can change the contract. Now, what was determined in that action? Clearly that the contract between the parties was such as was embraced in the policy declared on and proved in that action; and that the plaintiff had violated the policy, by keeping the fire-works. Now he seeks to establish, in this action, that that was not the contract, and to have it reformed; and that the real contract beween the parties was not violated. He sought, in that action, to recover for his loss, and gave all the proof he could to show that he was entitled to recover. Now without alleging that there was more than one contract of insurance, or more than one title or right, upon which to base a recovery, he seeks to recover for the same loss. This is a case, it seems to me, where the doctrine of *res adjudicata* must apply, and bar a recovery, unless plain principles of law, which have always been regarded as important in the administration of justice, are disregarded.

According to the case of Washburn v. Great Western Ins. Co. (114 Mass., 175)—in all its essential features like this—the plaintiff, having elected to sue upon the contract as it was, and been defeated, is bound by that election, and cannot now maintain this action to reform the contract.

The judgment must be affirmed, with costs.

## SIBERT v. McAVOY.

(Supreme Court of Illinois, 1853, 15 Ill. 106.)

CATON, J. . . . We think the complainant has come too late with his bill to correct a mistake in this contract. He brought an action upon that contract, which he prosecuted to final judgment, not only in the circuit court, but in this court also. He declared upon the contract as it was written, and in the agreed case admitted, that the work was done under that contract, as declared upon in that action. There was a dispute about the construction of the contract, but none about its terms. He contended then with his witness, that the written contract provided the same rule for the measurement of the work which he now insists was the actual agreement of the parties, but which he now says was left out of the agreement by mistake in drawing it up. In the construction of that agreement the court disagreed with him, and rendered judgment against him upon the contract. The contract then was merged in the judgment, and as a contract, ceased to exist. The trial was upon the entire contract, and left no part of it open to future controversy or adjudication. There is, then, no contract left between the parties, to be reformed and corrected. If there was a mistake in drawing up the contract the party should have had it corrected before he called upon, or, at least, before he finally submitted it to a court for its adjudication. He had no right, first, to go to the court of law and there try the experiment to see whether he could not get such a construction adopted as would make it embrace all that he contended for, as constituting the agreement of the parties, and failing in that, go into equity to get that inserted in the contract which he insisted was in it before.

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## DAVENPORT v. WIDOW AND HEIRS AT LAW OF SOVIL.

(Supreme Court of Ohio, 1856, 6 O. St. 459.)

BRINKERHOFF, J. . . . But in this case, the mistake not only occurs in the mortgage, but has been carried into the decree and sale of the premises described in the mistaken mortgage; and it is contended that the mortgage is merged in the decree, and the decree, satisfied by

the sale. And this presents the second question on which we are to pass.

Here was a total mistake in the description of the land intended to be mortgaged. The mortgage was intended to embrace premises which the mortgagor did own, but by mutual mistake it described only a parcel of land which the mortgagor never did own, and to which he never had or pretended to have any claim. The demurrer to the petition admits this; and if it were denied, and clearly and satisfactorily proved, the case would be the same. Let the mortgage be reformed, and made to conform to the intention of the parties; how then stands the case? The reformed mortgage is not merged in any decree, for there is no decree for the sale of any premises described in the mortgage as corrected and reformed. The decree may be satisfied, at least *pro tanto,* to the amount of the sale; but the decree was based on the mistaken, and not on the true, mortgage; the sale was of land not embraced in the true mortgage; no money or other valuable thing was ever received by the plaintiff; the whole proceeding is infected by the original mistake, and is therefore baseless, unsubstantial, and nugatory.

In the conclusion at which we have arrived on the question, we are not without the support of highly respectable authority. The case of Blodgett et al. v. Hobart et al., 18 Vt. 414, presented a question exactly analogous to that now before us, except that there was a decree of absolute foreclosure, instead of a decree for sale of the mortgaged premises, as in this case; and the misdescription went to a part, instead of the whole, of the mortgaged premises. It was there held that, "if the mistake was mutual, and be not discovered until after a decree of foreclosure has been obtained upon the mortgage, and the time fixed by the decree for the payment of the mortgage debt has expired, and the mortgage be then ordered to be reformed, the decree of foreclosure will be opened, so as to permit the mortgagor to redeem the entire premises by payment of the entire sum due upon the mortgage." And the cautious and carefully considered observations of Ranney, J., in Hollister v. Dillon, 4 Ohio St. 209, are of like tendency. We are of opinion, therefore, that the decree and sale under the mistaken mortgage constitute no just obstacle to the plaintiff's relief, especially as he will, by the record of this case, be forever estopped from claiming any title to premises purchased under the decree.

# CHAPTER VII. RESCISSION

## BATES v. DELAVAN.

(New York Court of Chancery, 1835, 5 Paige, 299.)

The Chancellor. . . . The failure of the title as to an undivided portion of the premises, by the successful assertion of a claim against which the defendant had agreed to indemnify the complainant, would have been sufficient to enable the latter to resist the making of a decree for a specific performance, upon a bill filed by the vendor. But it does not follow from this, that the complainant may rescind the whole contract, which has been in part consummated by the execution of the conveyance and the payment of a part of the purchase money. There are many cases in which the court will not lend its aid to compel a specific performance of an executory agreement, in which it would not feel itself authorized to interfere, by decreeing that an executed contract should be rescinded. . . .

## SECTION I. MISTAKE.

## KOWALKE v. MILWAUKEE ELEC. R'Y. & LIGHT CO.

(Supreme Court of Wisconsin, 1899, 103 Wis. 472, 79 N. W. 762.)

Plaintiff, a married woman, was injured by jumping from defendant's street car, in an emergency, and its liability for her injuries was probable. It appeared, among other things, that she was a woman of intelligence and experience, the mother of three children, and had passed by about a week the proper period of her menstruation. The defendant's surgeon, in company with her own family physician, visit-

ed her after the accident and learned she was having a slight uterine hemorrhage. The question of her pregnancy was raised, and an examination to ascertain that fact proposed and peremptorily refused, she stating she was not in that condition. Thereafter defendant's surgeon negotiated a settlement, under circumstances showing an entire absence of fraud, and she thereupon joined with her husband in executing a full release of all claims and demands, for damages or otherwise which she then had or could have by reason of jumping from the car. About two weeks thereafter she suffered a miscarriage. . . .

DODGE, J. . . . To formulate an accurate and practically applicable definition of the mistake of fact which will warrant rescission of a contract has been apparently well-nigh the despair of law writers. Indeed, no definition or general rule has been invented which is sufficient or accurate, except by immediately surrounding it with numerous exceptions and qualifications more important than itself. This is not surprising, in view of the fact that the whole doctrine is an invasion or restriction upon that most fundamental rule of the law, that contracts which parties see fit to make shall be enforced, and in view of the further consideration that one or both of the parties is often, if not usually, ignorant or forgetful of some facts, thoughtfulness of which might vary his conduct. . . .

Another essential element of the definition is that the fact involved in the mistake must have been as to a material part of the contract, or, as better expressed by Mr. Beach (Mod. Eq. Jur., secs. 52, 53), an intrinsic fact; that is, not merely material in the sense that it might have had weight if known, but that its existence or nonexistence was intrinsic to the transaction,—one of the things actually contracted about. As, in the familiar illustration of the sale of a horse, the existence of the horse is an intrinsic fact. Another partial expression of this requisite, adopted by Mr. Pomeroy (Eq. Jur., sec. 856), is as follows: "If a mistake is made as to some fact which, though connected with the transaction, is merely incidental, and not a part of the very subject-matter or essential to any of its terms, or if the complaining party fails to show that his conduct was in reality determined by it in either case the mistake will not be ground for relief, affirmative or defensive." The last part of this statement is adopted in Klauber v. Wright, 52 Wis. 303, 308; Grymes v. Sanders, 93 U. S. 55, 60.

Some illustrative cases of this aspect of the subject may serve to elucidate. The damaged condition of a ship at sea, as to which both parties to her sale are ignorant, held merely a collateral circumstance, and not an intrinsic fact. Barr v. Gibson, 3 Mees. & W. 390. Financial condition of a debtor is not intrinsic to a compromise and release of his debt, so that mistake thereon will justify rescission. Dambmann v. Schulting, 75 N. Y. 55, 63. Ignorance of declaration of peace, greatly enhancing value of merchandise, will not justify rescission of sale. Laidlaw v. Organ, 2 Wheat. 178. Sufficiency of security for a debt purchased as part of firm assets, not intrinsic. Segur v. Tingley, 11 Conn. 134, 143. Certain United States bonds had been extended, and, as a result, were commanding premium in market. Held not "of the essence" of a sale at par, both parties being ignorant as to both extension and premium. Sankey's Ex'rs. v. First Natl. Bank, 78 Pa. St. 48, 55. One who had built a mill partly on land of another purchased of that other two lots, both parties supposing them to include the mill, which, however, was found to be on a third lot. Court refused to rectify, holding that the contract related to purchase and sale of the lots named, and that, though presence of mill on one of them might have been an important consideration, it was not the fact as to which they contracted, not intrinsic to the transaction. Webster v. Stark, 78 Tenn. 406. Fact that a specific tract of land contains less than supposed, not affecting identity of thing purchased, is not "of the very subject-matter of the sale." Thompson v. Jackson, 3 Rand. (Va.), 507. . . .

Applying the definitions and rules of law above set forth, with their qualifications, to the facts of this case, it is clearly apparent that if there was a mistake, in the sense in which that word is used in the law, the fact as to which such mistake existed was not an intrinsic one,—it was not of the subject-matter of the contract. There was no mistake or misunderstanding as to the acts of the defendant, nor as to the injuries which the plaintiff had received. The effect of those injuries was, of course, problematical and conjectural. That very uncertainty entered into the compromise made, and was the consideration of a certain sum on one side, and the surrender of any larger sum on the other. The elements of the contract of settlement were: first, whether defendant was liable; and, secondly, what amount, in view of all the contingencies, should be paid and received in satis-

faction of such liability, and the question of the plaintiff's condition, whether pregnant or not, was merely a collateral question. It was no part of the injury caused by defendant, nor anything for which damages should be paid. At most, it was but one of the surrounding conditions which might or might not increase the effect of the injuries. It is probably true, in the great majority of personal injury cases, that the effect which the injuries received may have, as to time of disability, *quantum* of suffering, and the like, may be modified by the physical or mental condition of the injured party. For example, a predisposition to rheumatism would be a condition likely to enhance the subsequent effects of an injury,—especially a dislocation or other injury to a joint. A disturbed condition of the system might prevent the reuniting of a broken bone, otherwise practically certain. A predisposition to nervous troubles might vastly multiply the effects of a slight spinal injury. So that if the mere ignorance of such surrounding conditions can suffice to render ineffective a settlement, because after events indicate that the amount paid is inadequate, few compromises of the damages from personal injury could be relied on. Compromise is highly favored by the law, and any rule or doctrine by which the fair meeting of the minds of the parties to that end, in the great majority of cases which arise in human affairs, must fail to be permanent or effectual to settle their rights, is contrary to the whole spirit of the law, and should not be adopted. The question in each such case is, did the minds of the parties meet upon the understanding of the payment and acceptance of something in full settlement of defendant's liability? If they did, without fraud or unfair conduct on either side, the contract must stand, although subsequent events may show that either party made a bad bargain, because of a wrong estimate of the damage which would accrue. . . .

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## DAMBMANN v. SCHULTING.

(Court of Appeals of New York, 1878, 75 N. Y. 55.)

This action was brought to set aside a release under seal, and to recover a balance alleged to be due plaintiff for money loaned defendant by the firm of C. F. Dambmann & Co., of which firm plaintiff was a partner, and to whose rights he succeeded. . . .

Earl, J. Prior to 1866, the defendant had for many years been a merchant extensively engaged in business in the city of New York. In February of that year, he had become financially embarrassed. and contemplated an assignment for the benefit of his creditors. He was finally dissuaded from making an assignment by the promise of his creditors to loan him the sum of $100,000 to aid him in meeting his obligations. There was evidence tending to show that the sums thus to be loaned were to be repaid when he became able; but he testified that it was to be optional for him to repay them, in case he paid the debts, which he then owed, in full. The court at Special Term found that the arrangement was that he was to repay these sums when he became able. In pursuance of this arrangement, the firm to which plaintiff belonged, and to whose rights he had succeeded, loaned defendant $10,000. On the seventh day of March, 1867, defendant had paid in full all the debts he owed when the money was loaned to him, and then, at his request, all the creditors who made the loans executed and delivered to him an instrument of which the following is a copy, towit: "We the undersigned agree, in consideration of one dollar paid to us, to discharge H. Schulting from the legal payment of the money loaned to him February first, 1866, said Schulting giving his moral obligation to refund the said money, in part or whole, as his means will allow in future." This was not a sealed instrument, and was executed upon the request of the defendant, upon the claim by him that he had done as he had agreed when the money was advanced to him. It was the clear intention of the parties, by this instrument, to discharge the defendant from all legal obligation to pay the money advanced, leaving an obligation simply binding upon his conscience, but not enforceable at law, to pay when he became able, in whole or in part. If this instrument had been under seal or based upon a sufficient consideration, no proceedings in law or equity could have been thereafter taken to enforce payment against the defendant.

But according to the finding of the Special Term, before the execution of this instrument, the defendant was legally liable to pay when he became able, and this liability was not discharged by this instrument, for the simple reason that it was not based upon any consideration. It was not in the nature of a composition of a debtor with his creditors, and cannot be sustained upon the principles applicable to composition agreements. It does not even appear that each creditor signed it upon the consideration that other creditors would also sign it. It was a

mere agreement to discharge debts without payment, and such an agreement cannot be upheld. . . .

The defendant knew as early as the eighth day of October, 1868, that goods to the amount of $400,000 had been sold, and that some yet remained to be sold. On the last-named day he went to the plaintiff and said to him that he understood that the previous paper signed by him—the discharge above set out—was not a legal release, because he had not paid anything on account of the $10,000, and he wanted to know if the plaintiff would sign a legal release, upon payment of $5,000. The plaintiff said he would. Nothing more was said, and defendant paid him $5,000; and then the plaintiff executed to him, under seal, a full and absolute discharge from all liability. This action was brought to set aside this release and to recover the balance of the $10,000. . . .

It is further claimed that the plaintiff ought to be entitled to relief on account of mistake. He testified that he would not have executed the release if he had known the defendant's financial condition. But as already shown, the defendant was in no way responsible for his ignorance, and was under no legal or equitable obligation to disclose the facts as to his pecuniary circumstances. The plaintiff could have learned the facts by inquiry of the defendant or his vendees. There was no mistake as to any fact intrinsic to the release. Plaintiff knew that the defendant had not been legally discharged from his liability, and that for the $5,000 he was to give him an absolute release; and he gave him just such a release as he intended to. There was no mistake of any intrinsic fact essential to the contract or involved therein. The defendant's financial condition was an extrinsic fact, which might have influenced the plaintiff's action if he had known it. But ignorance of or mistake as to such a fact is not ground for affirmative equitable relief. The following illustrations of mistakes as to intrinsic facts essential to contracts, against which courts of equity will relieve, are found in the books. A. buys an estate of B. to which the latter is supposed to have an unquestionable title. It turns out, upon due investigation of the facts, that B. has no title; in such a case, equity will relieve the purchaser and rescind the contract: Bingham v. Bingham (1 Vesey, 126). If a horse should be purchased, which is by both parties believed to be alive, but is, at the time, in fact dead, the purchaser would, upon the same ground, be released by

rescinding the contract: Allen v. Hammond (11 Peters, 71). If a person should execute a release to another party upon the supposition, founded on a mistake, that a certain debt or annuity had been discharged although both parties were innocent, the release would be set aside: Hore v. Becher (12 Simons, 465). If one should execute a release so broad in its terms as to release his rights in property, of which he was wholly ignorant, and which was not in contemplation of the parties at the time the bargain for the release was made, a court of equity might either cancel the release or restrain its application as intended: (Cholmondeley v. Clinton, 2 Meriv., 352; Dungey v. Angove, 2 Ves., 304). On the other hand, if the vendee is in possession of facts which will materially enhance the price of the commodity and of which he knows the vendor to be ignorant, he is not bound to communicate those facts to the vendor, and the contract will be held valid: Laidlaw v. Organ (2 Wheat., 178). In such a case the facts unknown to the vendor are extrinsic to the contract and are not of its substance; and hence there is no ground for the interference of a court of equity.

It is clear from these, and other illustrations which might be given, that a court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance.

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## GOULD v. EMERSON.

(Supreme Court of Massachusetts, 1894, 160 Mass. 438, 35 N. E. 1065.)

Bill in equity, filed in the Superior Court, for the correction of a mistake made in settling the accounts of a partnership between the parties, for the surrender and cancellation of a promissory note given

in pursuance of such settlement, and for the payment of the sum found due to the plaintiff upon the taking of an account. . . .

ALLEN, J. There was a plain mistake in the giving of the note for $10,000 to the defendant. It should have been for only $5,000. There was no fraud, but it was a case of mutual mistake as to the manner of carrying out what had been settled and agreed on. Upon dissolving the partnership between the plaintiff and the defendant, the plaintiff was to take the goods on hand and pay the defendant for his interest therein. The value of the goods was fixed at $16,000, and the plaintiff gave to the defendant his note for $8,000, and this has been paid. There was no mistake as to this. But the plaintiff had withdrawn from the funds of the firm $10,000 more than the defendant had, and to make this right between the parties the plaintiff would have to restore the $10,000 to the firm, or pay the defendant for his share thereof, which would be $5,000. Instead of doing this, by sheer inadvertence or ignorance of what is plain when you come to look at it carefully, the plaintiff gave his note for $10,000 to the defendant. This gave to the defendant the whole of a sum which belonged to the firm, and which he was entitled to only one half of. The mistake, though gross, was mutual and innocent; and the plaintiff at any time upon discovering it might had had a bill in equity for relief against it. Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290, 319, 320; Canedy v. Marcy, 13 Gray, 373; Wilcox v. Lucas, 121 Mass. 21; Goode v. Riley, 153 Mass. 585; Beauchamp v. Winn, L. R. 6 H. L. 223; Daniel v. Sinclair, 6 App. Cas. 181, 190, 191; Paget v. Marshall, 28 Ch. D. 255. And though the contract has been executed, a court of equity may grant relief, and decree repayment of money so paid by mistake. Tarbell v. Bowman, 103 Mass. 341; Wilson v. Randall, 67 N. Y. 338; Paine v. Upton, 87 N. Y. 327. . . .

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## GEE v. SPENCER.

(In Chancery, 1681, 1 Vern. 32.)

A man possessed of a lease for *three* lives of the rectory of *Orpington* in *Kent*, devised the rectory by his last will; but that being void, it came to his three daughters as coheirs and special occupants. There

being a suit touching this rectory in Chancery, the husband of one of the daughters fearing to be in law, and being made to believe, that he should be forced to pay costs, releases the arrears that should be coming to him for his share in the rectory to the other sisters, who were to bear the charge of the suit; his share of the arrears amounted to £1000.

This release was set aside, and *Luxford's* case cited *that a misapprehension in the party shall avoid his release.*

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## BROUGHTON v. HUTT.

(In Chancery, 1858, 3 DeG. & J. 501.)

This was an appeal from a decree of Vice-Chancellor Stuart directing a deed of indemnity to be delivered up to the cancelled, as having been executed under mistake of fact and law.

The plaintiff was the heir-at-law of his father John Vickery Broughton, who had been a shareholder in the Western Australian Company. This was a company formed for the purpose of purchasing lands in Western Australia. The deed of settlement of the company, dated the 1st of March, 1841, provided among other things as follows: "That every shareholder of the company, his executors or administrators, as between him and the other shareholders and their respective executors and administrators, shall be liable for or in respect of the calls, debts, losses, and damages of and upon the company in proportion to his joint or separate share and interest for the time being in the funds or property of the company, but not further or otherwise."

The 103rd article provided as follows: "That all the property of the company shall be deemed personal estate and be transmissable as such, and shall not be deemed to be of the nature of real property."

The plaintiff's father died in June, 1850, having made a will dated the 18th of April, 1850, which did not, however, mention the shares. He appointed his wife and his two daughters executrixes of his will, which was proved by the wife alone.

Under an erroneous impression that the shares were in the nature of real estate, it was considered by the plaintiff and the executrix that the testator died intestate as to them, and that they belonged to the plaintiff as his heir-at-law. The defendants, who were trustees of the

company, knew of the death of the testator shortly after it took place, and before the date of the indenture next mentioned, and received from his executors in that character a payment on account of a call.

The company having become involved in pecuniary difficulties, an indenture was executed by the defendants, by the plaintiff and by several shareholders, and was dated the 30th of May, 1853. It recited that the several persons, parties thereto, of the first part, of whom the plaintiff was one, were respectively shareholders in the company. By the witnessing part each of the parties of the first part thereby for himself, his heirs, executors, or administrators, but not further or otherwise, or the one for the others or any other of them, covenanted with the parties of the second part, their executors, administrators, and assigns, and with each of them, his executors, administrators, or assigns separately, that in the event of certain loans being raised as in the deed mentioned, and in the events of the personal guarantees of the said persons, parties thereto, of the second part, or any of them, being given for the repayment thereof, and of any loss or damage whatsoever being occasioned to the person or persons giving such guarantee, or any of them, or the heirs, executors, or administrators of them, or any of them, by reason of such guarantee, then and in such case and whensoever the same should happen, he, the said covenanting party, his heirs, executors, or administrators, would ratably, and in proportion to the number of shares set after his name, and within the limit thereinafter mentioned, indemnify and reimburse such persons or person incurring any such loss or damage, their or his heirs, executors, administrators, or assigns, respectively, from, for, or against the same.

The plaintiff stated in his bill and affidavit, that when he executed this deed he believed that the three shares which had been purchased by his late father belonged to him as his fathers' heir-at-law, and executed the deed under that belief and in ignorance of the provisions and contents of the deed of settlement; that it was not until the month of November, 1857, that he became aware that the shares did not devolve upon him. That, in consequence of the company's solicitors applying for payment of the sum of £600, the plaintiff consulted his solicitors, and then, for the first time, was advised that he had no right to the shares, and that it was not until the actions about to be

mentioned were commenced against him that the plaintiff became aware of the provisions of the deed of settlement, or in particular of the articles above set out. . . .

THE LORD JUSTICE KNIGHT BRUCE. Whether the plaintiff has a case for relief at law as well as in equity, I will give no opinion; but certainly he has a case for equitable relief, whether he has incurred any legal liability by executing the deed or not. It is unimportant for all the purposes of this suit whether the plaintiff is under legal liability or not. I doubt whether he is; but, however that may be, it makes no difference to his claim to relief in equity. It is evident that he executed the deed under a mere mistake of law and fact. Were the defendants aware of the real circumstances of the case when they procured the execution of this deed by the plaintiff, with no knowledge on his part of its contents except such as might have been obtained from reading it for the first time in the room? It is impossible that the defendants can be heard to say that they were not themselves aware of the circumstances. Probably, independently of the payment of the call by persons who are called in the books of the company "executors," I should have come to the same conclusion, but that fact is decisive. The defendants could not but have known that the plaintiff was not a shareholder, and they ought not to have allowed him to sign the deed, without apprising him of the fact. I am not convinced that any damage has accrued or will accrue to the defendants by reason of the plaintiff having executed the deed. But, assuming that some damage has accrued or may accrue to them, it is damage which, with the knowledge of the circumstances of the case, they have brought, or will bring, upon themselves. It seems to me a plain case for relief, and the appeal must therefore be dismissed with costs.

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## CLOWES v. HIGGINSON.

(In Chancery, 1813; 1 V. & B. 526.)

THE VICE CHANCELLOR. I feel great difficulty in compelling the Defendants to convey upon the terms now proposed. I do not understand the bill, taken altogether, as meaning that the Plaintiff is ready

to perform the agreement according to any construction the Court may put upon it; throwing the construction upon the Court. The Plaintiff has uniformly contended, both at the *Rolls* and here, from the commencement of these suits to the last decree, that he never made, or intended, any agreement but to take the estate with the timber upon it, with the exception of Lots 4 and 5; and as evidence of that he adduces this paper; to make out his construction. This is not like the case, to which it has been compared; a Plaintiff calling upon the Court to construe and execute a will according to the true construction; suggesting that, which he conceives to be so; but this Plaintiff merely submits to perform the agreement, as he intended it; according to the true intention, as he represents it; that is, to have the timber with the estate; never meaning to pay for the timber separately. The Defendants insist on the contrary construction, as that, which was intended by them. Though there is but one paper referred to, containing the particulars, conditions, and declarations, in truth there are two distinct and opposite agreements, one insisted on by each party, as evidenced by that paper; the one including, the other excluding, the timber. In such a case of mutual mistake, the one not intending to sell what the other meant to buy, the Court, feeling the injustice of giving to either a performance upon terms to which the other never agreed, has come to the conclusion, that there is no contract between them; that they did not rightly understand each other; and therefore it is not possible without consent to compel either to take what the other has offered. This Plaintiff having uniformly up to the hearing insisted on his construction, as the only contract between them, not offering to take up the other construction, which the Defendant was at one time willing to have performed, it is perfectly different from calling upon the Court to declare the true construction, and submitting to perform according to that. The Court, having in both instances considered the transaction as too ambiguous to form the foundation of a contract, cannot now take this passage in the answer as the ground of a decree for specific performance against the will of the Defendants; and compel them to accept terms which they once offered, but to which the other party would not then consent.

The bill must therefore stand dismissed without costs.

## LYMAN v. UNITED INSURANCE COMPANY.

(New York Court of Errors, 1819, 17 Johns. 373.)

Spencer, Ch. J. The principles which must govern this case are, in my apprehension, very plain and simple. The appellants seek to have a policy of insurance amended, after a loss has happened, on the ground of a mistake in the policy in several particulars, but principally in this, that the brig insured by the respondents, is described in the policy as the "good *American* brig, called the *Union*," when, as it is alleged, it was the intention of the appellants, and must have been so understood by the respondents, that her national character should be *Portuguese*. . . .

It is not enough, in cases of this kind, to show the sense and intention of one of the parties to the contract; it must be shown, incontrovertibly, that the sense and intention of the other party concurred in it; in other words, it must be proved, that they both understood the contract, as it is alleged it ought to have been, and as in fact it was, but for the mistake. It would be the height of injustice to alter a contract, on the ground of mistake, where the mistake arises from misconception by one of the parties, in consequence of his imperfect explanation of his intentions. To make a contract, it is requisite that the minds of the contracting parties agree on the act to be done; if one party agrees to a contract under particular modifications, and the other party agrees to it under different modifications, it is evident there is no contract between them. If it be clearly shown, that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shown, that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract. There may be cases in which the mistake is rendered so palpable, that the denial of it by one party would not be entitled to credit. The question would be, how it ought to have been understood, and how the court believe it must have been understood.

I confess, that I am strongly impressed with the belief, that when the appellants applied to the respondents for insurance, they intended, by the representation, that "the said brig will sail under a *Portuguese*

royal passport," that her national character was to be *Portuguese*. But I am as strongly persuaded, that the respondents did not understand the representation in that way, but, on the contrary, that they believed she was to be documented as an *American* ship, carrying a *Portuguese* passport, as an innocent disguise of her real *American* character: and that, consequently, the appellants have failed in making out the fact, that there was a mutual mistake in the policy. . . .

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## SWEDESBORO LOAN & BLDG. ASS'N. v. GANS

(New Jersey Court of Chancery, 1903, 65 N. J. Eq. 132, 55 Atl. 82.)

REED, V. C. This suit is brought to have a mortgage which has been cancelled upon the record re-established and foreclosed. The facts, as I gather them from the pleadings, from the meagre testimony and from the position taken by counsel, are as follows: One Charles Gans, of Gloucester county, made a mortgage, dated March 11th, 1892, to the Swedesboro Loan and Building Association to secure the sum of $1,100, payable in one year. Charles Gans, the mortgagor, died June 9th, 1894, intestate, leaving him surviving his widow, Kate P. Gans, and as his heirs, two brothers—James and John—and three sisters—Jennie, Phebe and Mary.

On April 1st, 1895, the widow released to the complainants her right of dower in the mortgaged premises. The complainant accepted a deed from one Sebastian Gans, the father of Charles, the deceased mortgagor, under the belief that on the death of Charles the property descended to his father. After the execution of this deed, the loan and building association, believing that it held the legal title to the premises, on August 5th, 1895, cancelled its mortgage. The procuration of the deed from Sebastian Gans seems to have been accomplished by one Benjamin McAllister, who was a scrivener and was at one time a director of the building association and did writing for them, and who seems also to have been mixed up in the settlement of the estate of Charles Gans. He apparently acted as intermediary between the building association and the Ganses, and got the deed which the complainant accepted upon his word as a conveyance of the equity of redemption in the mortgaged premises. Upon the execution of this deed the complainant went into possession, and has since received the

rents and profits therefrom. There can be no doubt that the cancellation of the mortgage was induced by the belief that by force of the deed of Sebastian Gans the land association owned a complete title to the property.

It is thus manifest that the equity of the situation is entirely with the complainant. The defendants, as heirs of Charles Gans, received the property subject to the lien of this mortgage. The cancellation of the mortgage was a pure gift to the defendants of the mortgagee's interest in the property. The heirs had not paid one cent to bring about this change in the respective position of mortgagee and heirs.

Neither has any purchaser, *bona fide* or otherwise, come into existence upon the faith of the cancellation of the mortgage.

It is clear, therefore, that unless some inexorable rule compels otherwise, the complainant should be relieved from the predicament into which it was misled by its belief in its ownership of a complete title to the mortgaged property.

The substantial ground upon which the heirs resist the granting of this relief is that while the cancellation was caused by a mistake of the complainant, it was a mistake of law and not of fact. The maxim *juris ignorantia non excusat* is invoked by the defendants. This maxim is subject to so many exceptions that it is quite as often inapplicable to supposed mistakes of law.

That the present case, involving the release of private rights under a mistaken notion as to private ownership of property, is one in which the English courts of chancery would afford prompt relief cannot be doubted. The line of cases granting relief where a man purchased his own property through mistake (Bingham v. Bingham, 1 Ves. Sr. 127), or where a release was made so broad in its terms as to release rights of property of which the party was ignorant (Chalmondeley v. Clinton, 2 Mer. 171), or where a party, under the misapprehension that he had no title, surrendered to the supposed owner (Pusey v. Desbouvrie, 3 P. Wms. 315), exhibit the degree in which courts of equity granted relief from such mistakes. In Livesey v. Livesey, 3 Russ. 287, an executrix, who under a mistaken construction of a will, had overpaid an annuity, was permitted to deduct the amount overpaid from subsequent payments. In McCarthy v. Decaix, 2 Russ. & M. 614, a person was relieved where he had renounced a claim of property made under a mistake respecting the validity of a marriage, the

lord-chancellor saying: "What he has done was in ignorance of the law, possibly of fact; but in a case of this kind this would be one and the same thing."

In Cooper v. Phibbs, L. R. 2 H. L. 149, 172; S. C., 22 Eng. Rul. Cas. 870, an agreement was cancelled because it had been entered into through a mistake as to the ownership of a fishery. In this case Lord Westbury expressed the much-discussed sentiment that the word "*jus*" in the maxim is used to denote a general law, and has no application to private rights. The result of this decision of the house of lords was that an act caused through a mistake as to ownership of property would be remedied in equity. In Beauchamp v. Winn, L. R. 6 H. L. 223, 264; S. C. 22 Eng. Rul. Cas. 889, a mutual mistake in an agreement as to the rights of the parties resulted in a correction of the agreement.

The result of the English cases is summed up by Mr. Kerr in the remark "that if a man though misapprehension or mistake of the law parts with or gives up private rights to property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if under the general consideration of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired." Kerr, Fr. This statement of the equitable rule was cited with apparent approval by Chancellor Runyon in Macknet v. Macknet. 2 Stew. Eq. 54, 59, and in Martin v. New York, Susquehanna and Western Railroad Co., 9 Stew. Eq. 109, 112.

The equity cases in this country, more particularly the earlier cases, exhibit a less liberal spirit in granting relief for mistakes in law. This resulted mainly, I think, from the great influence which the early reported cases decided by Chancellor Kent had in shaping the early equity jurisprudence of this country.

The case of Lyon v. Richmond, 2 John. Ch. 60, was an application to set aside an agreement, because it was entered into under the influence of a supposed condition of the law, and afterwards the court of errors rendered a decision which changed the law as it was supposed to exist when the agreement was made. In deciding that the court could grant no relief, Chancellor Kent, having in mind, of course, the particular facts of that case, made some general remarks in respect to the impolicy of a court of equity attempting to relieve

against mistakes of law. These remarks appear again and again in the earlier cases, being used as a general authority against the granting of relief in all cases of mistakes of law. . . .

Our later cases display a desire to discover ground to rectify an equitable result flowing from mistakes of all kinds. . . .

The ability of courts of equity to rectify mistakes arising from ignorance of the law is everywhere acknowledged to exist in certain instances. The propriety of exercising this power must depend upon the circumstances which surround each case. It will depend upon whether a party who asks relief has been negligent; whether he has been led into his belief by the other party; whether other innocent parties will be injured by a rectification of the mistake, or whether the mistake can be regarded as one of fact, although indirectly resulting from a mistaken notion of the law. All these and other features are to be considered in deciding whether it is equitable and politic to put the mistaken party *in statu quo*. . . .

In my judgment the power should be exercised in the present case. The mistake was in respect to the ownership of the property upon which the cancelled mortgage was an encumbrance, and the English cases treat such a mistake as one of fact.

Again, the annulment of the mortgage was without any consideration whatever. Nothing was received by the mortgagee and nothing was paid by the heirs.

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## JORDAN v. STEVENS.

(Supreme Court of Maine, 1863, 51 Me. 78.)

Davis, J. . . . But while the weight of authority is clearly against granting relief *merely* on account of a mistake of the *law*, it seems to be conceded in nearly all the cases, and expressly decided in many of them, that there are exceptions to this rule. Hunt v. Rousmanier, 1 Pet., 15; Bank of U. S. v. Daniel, 12 Pet., 32.

Instead of saying that there are "exceptions" to the rule, it would probably be more correct to say that, while relief will *never* be granted *merely* on account of the mistake of the law, there are cases where there are *other elements, not in themselves* sufficient to authorize the Court to interpose, but which, *combined with* such a mistake, will

entitle the party to relief. It is important therefore to inquire *what it is* that, with a mistake of the *law*, will justify the interposition of the Court, where there is no fraud, or accident, or mistake of *fact*.

If a party, who himself knows the law, should, *deceive* another, by misrepresenting the law to him; or, *knowing him* to be ignorant of it, should therein take advantage of him, relief would be granted on the ground of *fraud*. So that such a case is within neither the rule nor the exception.

It has sometimes been said that, when money or other property has been obtained under a mistake of the law, which the defendant *ought not in good conscience to retain*, he should be compelled to restore it. Northrup v. Graves, 19 Conn., 548; Stedwell v. Anderson, 21 Conn., 139. This is just, as a *principle*, but entirely indefinite, as a *rule*. It proposes nothing but the opinion of the Court in each case, on a matter in regard to which there may be great differences of opinion. It overlooks the *public* interests involved in maintaining the obligation of contracts. Generally, *as between the parties*, a mistake of *law* has as equitable a claim to relief, as a mistake of *fact*.

It is believed that in nearly all such cases, where relief has been granted, in addition to the intrinsic equity in favor of the plaintiff, two facts have been found; (1), that there has been a marked disparity in the position and intelligence of the parties, so that they have not been on equal terms; (2), and that the party obtaining the property *persuaded* or *induced* the other to part with it, so that there has been "undue influence" on the one side, and "undue confidence on the other. 1 Story's Eq., 120. When property has been obtained under such circumstances, and by such means, courts of equity have never hesitated to compel its restoration, though both the parties acted under a mistake of the law. And there would be still stronger reasons for granting relief in such a case, if the party from whom the property had been obtained, *had been led into his mistake of the law by the other party*. Sparks v. White, 7 Hump., (Tenn.,) 86; Fitzgerald v. Peck, 4 Littell, (Ky.,) 127.

Thus, in Pickering v. Pickering, 2 Beav., 31, Lord Langdale set aside certain agreements entered into under a mistake of the law, on the ground that "the parties were not on equal terms;" and that the plaintiff acted under the influence of the defendant. And the same thing was done in Wheeler v. Smith, 9 How. U. S., 55, because the

parties "did not stand on equal ground;" and the plaintiff "did not act freely, and with a proper understanding of his rights." . . .

The case at bar is one of this kind. The parties were not on equal terms. The plaintiff was ignorant, in business affairs, as well as in other respects. Having confidence in the defendants she relied upon what they told her. It does not appear that she doubted the validity of her father's lease to her, until such doubts were communicated to her from them. The proposition for her to release her interest in all the other property did not originate with *her,* but with *them;* and she was induced to accept it by the *fear,* which *they* had impressed upon her, that she otherwise would have to give up the homestead. She acted under their influence. They believed that there was a defect in the first lease, and they meant to take advantage of it. As was said by the Master of the Rolls, afterwards Lord Kenyon, in Evans v. Llewellyn, 1 Cox, 333, "though there was no fraud, there was something like fraud; for an undue advantage was taken of her situation. The party was not competent to protect herself; and therefore this Court is bound to afford her such protection." . . .

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## GRYMES v. SANDERS.

(United States Supreme Court, 1876, 93 U. S. 55.)

Swayne, J. . . . Peyton Grymes, the appellant, owned two tracts of land in Orange County, Va., lying about twenty-five miles from Orange court-house. The larger tract was regarded as valuable on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands, which the appellant had sold to others. Catlett applied to him for authority to sell the two tracts, which the appellant still owned. It was given by parol; and the appellant agreed to give, as Catlett's compensation, all he could get for the property above $20,000. Catlett offered to sell to Lanagan. Lanagan was unable to spare the time to visit the property, but proposed to send Howel Fisher to examine it. This was assented to; and Catlett thereupon wrote to Peyton Grymes, Jr., the son of the appellant, to have a conveyance ready for Fisher and himself at the court-house upon their arrival. The conveyance was pro-

vided accordingly, and Peyton Grymes, Jr., drove them to the lands. They arrived after dark, and stayed all night at a house on the gold-bearing tract. Fisher insisted that he must be back at the court-house in time to take a designated train east the ensuing day. This involved the necessity of an early start the next morning. It was arranged that Peyton Grymes, Jr., should have Peyton Hume, who lived near at hand, meet Fisher on the premises in the morning and show them to him, while Grymes got his team ready for their return to the court-house. Hume met Fisher accordingly, and showed him a place where there had been washing for surface-gold, and then took him to an abandoned shaft, which he supposed was on the premises. . . .

When Fisher made the examination at the shaft, it had been abandoned. This was *prima facie* proof that it was of no account. It does not appear that he thought of having an analysis made of any of the debris about it, nor that the debris indicated in any wise the presence of gold. He requested Hume to send him specimens from the shafts on the contiguous tracts, and it was done. No such request was made touching the shaft in question, and none were sent. It is neither alleged nor proved that there was a purpose at any time, on the part of the appellees, to work the shaft. The quartz found was certainly not more encouraging than that taken from the last cut made by Bowman under the advice of Embry and Johnson. This cut he refused to deepen, and abandoned. When Lanagan and Repplier were told by Johnson that the shaft was not on the premises, they said nothing about abandoning the contract, and nothing which manifested that they attached any particular consequence to the matter, and certainly nothing which indicated that they regarded the shaft as vital to the value of the property. They proceeded with their examination of the premises as if the discovery had not been made. On his way to Philadelphia, after this visit, Lanagan saw and talked several times with Williams, who had prepared the deed. Williams says, "I cannot recollect all that was said in those conversations, but I do know that nothing was said about the shaft, and that he said nothing to produce the impression that he was dissatisfied or disappointed in any respect with the property after the examination that he had made of it." Lanagan's conversation with Houseworth was to the same effect.

The subsequent conduct of the appellees shows that the mistake had no effect upon their minds for a considerable period after its discovery, and then it seems to have been rather a pretext than a cause.

Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence "which may be fairly expected from a reasonable person." Kerr on Fraud and Mistake, 407.

Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary-lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotation until the transaction was closed. It was their own fault that they did not avail themselves of it. In Manser v. Davis, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. . . .

A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo*. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. Here the appellant received the money paid on the contract in entire good faith. He parted with it before he was aware of the claim of the appellees, and cannot conveniently restore it. The imperfect and abortive exploration made by Bowman has injured the credit of the property. Times have since changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the ap-

pellant. Hunt v. Silk, 5 East. 452; Minturn v. Main, 3 Seld. 227; Okill v. Whittaker, 2 Phill. 340; Brisbane v. Davies, 5 Taunt. 144; Andrews v. Hancock, 1 Brod & B. 37; Skyring v. Greenwood, 4 Barn. & C. 289; Jennings v. Broughton, 5 De G., M. & G. 139.

The parties, in dealing with the property in question, stood upon a footing of equality. They judged and acted respectively for themselves. The contract was deliberately entered into on both sides. The appellant guaranteed the title, and nothing more. The appellees assumed the payment of the purchase-money. They assumed no other liability. There was neither obligation nor liability on either side, beyond what was expressly stipulated. If the property had proved unexpectedly to be of inestimable value, the appellant could have no further or other claim. If entirely worthless, the appellees assumed the risk, and must take the consequences. Segur .v. Tingley, 11 Conn. 142; Haywood v. Cope, 25 Beav. 140; Jennings v. Broughton, 17 id. 232; Atwood v. Small, 6 Cl. & Fin. 497; Marvin v. Bennett, 8 Paige, 321; Thomas v. Bartow, 48 N. Y. 198; Hunter v. Goudy, 1 Ham. 451; Halls v. Thompson, 1 Sm. & M. 481.

The bill, we have shown, cannot be maintained. . . .

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## SECTION II. FRAUD

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### JACK v. BLETTNER.

(Illinois Appellate Court, 1909, 148 Ill. App. 451.)

Defendant Fred S. Gray claimed to own a saloon and liquor store at No. 3865 Cottage Grove avenue, of which he was in possession, of the value of $5,000. On April 13, 1907, complainant was in the saloon of Gray, who then represented, for the purpose of inducing complainant to purchase a half interest therein, that the business conducted in said saloon was very profitable and that the gross receipts were free from liens and encumbrances; that all of said representations were false when made, and so known to be false by Gray when he made them; that in fact the receipts of said saloon were small

and barely sufficient to pay running expenses; that the saloon and its contents were mortgaged for a large sum to the Berghoff Brewing Company of Chicago; that Gray, in furtherance of carrying out his fraudulent scheme, and to deceive and prevent complainant from inquiry into the true condition and situation of said saloon business, induced complainant to partake freely of intoxicating liquor, which he did to such an extent that he became drunk and intoxicated and totally unable to intelligently transact business; that while in such drunken state Gray induced complainant to pay him the sum of $100 in money, and to assign and deliver to him a promissory note made by defendant Bowyer, payable on September 15, 1907, to the order of his sister-in-law, the defendant Maud H. Jack, for the sum of $500, which note Maud H. Jack had endorsed and delivered to him; that he was induced to pay said money and deliver said note as earnest money for a half interest in Gray's saloon and business, and pending the time during which complainant could examine into the title of Gray to the saloon property; that complainant did not receive any receipt for said payments or any bill of sale or other conveyance of any interest in the saloon of Gray; that the intoxication of complainant was so profound that he became unconscious and in such unconscious condition was taken to his home, and as a result of such intoxication he became sick and remained confined to his home and his bed for several weeks thereafter; that upon recovering from his sickness he learned that the Berghoff Brewing Company had foreclosed its mortgage upon the saloon and its contents and ousted Gray from possession thereof; that on maturity of the note defendant Blettner, claiming to be its legal owner, through his attorneys, the defendants Hebel and Haft, commenced suit thereon, in the Municipal Court of Chicago, against Gray, Maud H. Jack and complainant as endorsers, and Bowyer as maker of the note; that defendant Blettner was the agent of the Berghoff Brewing Company and was not an innocent purchaser for value, but was privy to the frauds practiced upon complainant, by which the transfer of the note was procured to Gray, and was present in Gray's saloon at the time of the transaction and witnessed the artifices resorted to by Gray in procuring the note and the money from complainant; that Blettner paid no consideration to Gray for said note; that no defendant other than Bowyer was summoned in the suit brought in the Municipal Court on the note. . . .

Mr. Justice Holdom. We think it quite plain that the averments of complainant's bill being conceded to be true, the facts there alleged make it patent that his remedy, if any, is at law and not in equity. There is no averment of insolvency of Gray or Blettner, and an action for fraud and deceit against them, jointly or separately, would seem to furnish a complete and effectual remedy to complainant for the wrongs he alleges he has suffered at their hands. While equity and law have concurrent jurisdiction to relieve against fraud, still when the remedy at law is, as here, adequate and complete and not surrounded with obstacles or unusual inconvenience, equity will not interfere, but leave the parties to obtain redress at law. In a case like the one before us, involving questions of fact, presumably in dispute, where the parties are entitled to a trial by a jury to determine such questions of fact, it is the policy of equity not to take jurisdiction, but to relegate the parties to that remedy at law where their constitutional right to have the facts in dispute submitted to a jury can be accorded them. This would be so even in a doubtful case, which the case at bar certainly is not. Shenehon v. Ill. Life Ins. Co., 100 Ill. App. 281; Hacker v. Barton, 84 Ill. 313.

Complainant's counsel cite Vol. 14, p. 172, Am. & Eng. Ency. of Law, and cases there cited, to sustain their contention that equity will take jurisdiction in cases of fraud of the character of the case disclosed by the bill, and make the following quotation, viz: "Subject to a few exceptions, courts of equity exercise a general jurisdiction to grant relief in cases of fraud, concurrent with the jurisdiction of courts of law. It is a general rule, however, that a court of equity will not assume jurisdiction in a case where there is a plain, adequate and complete remedy at law, even though fraud is charged as a ground of relief. But to exclude jurisdiction, it is not enough merely to show that there is a remedy at law. The remedy must be plain, adequate and complete." We accord our approval of this statement of the law and, conceding its correctness, its application to the case at bar inhibits the right of complaint to any relief in equity. His remedy is complete, plain and adequate at law. There is no reason apparent from any averment of the bill, on the assumption that all of them are susceptible of proof, why a court of law cannot grant full and complete relief to complainant for the frauds alleged in his bill to have been practiced upon him.

## ADAMS v. GILLIG.

(Court of Appeals of New York, 1910, 199 N. Y. 314, 92 N. E. 670.)

The defendant sought to purchase a portion of the plaintiff's lot fronting on Elmwood avenue and stated that he desired to purchase the same for residence purposes.

CHASE, J. Any contract induced by fraud as to a matter material to the party defrauded is voidable. . . .

The simple question in this case is, therefore, whether the alleged intention of the defendant to build a dwelling or dwellings upon the lot which he sought to purchase is such a statement of an existing material fact as authorizes the court to cancel the deed because of the fraud.

The distinction between a collateral agreement as a part of a contract to do or not to do a particular thing, and a statement and representation of a material existing fact made to induce the contract may be further profitably considered.

A promise as such to be enforceable must be based upon a consideration, and it must be put in such form as to be available under the rules relating to contracts and the admission of evidence relating thereto. It may include a present intention, but as it also relates to the future it can only be enforced as a promise under the general rules relating to contracts.

A mere statement of intention is a different thing. It is not the basis of an action on contract. It may in good faith be changed without affecting the obligations of the parties. A statement of intention does not relate to a fact that has a corporal and physical existence, but to a material and existing fact nevertheless not amounting to a promise but which as in the case under discussion affects and determines important transactions. The question here under discussion is not affected by the rules relating to the admission of testimony. As it was not promissory and contractual in its nature there is nothing in the rules of evidence to prevent oral proof of the representations made by the defendant to the plaintiff. In an action brought expressly upon a fraud, oral evidence of facts to show the fraud is admissible.

In civil actions relating to wrongs, the intent of the party charged with the wrong is frequently of controlling effect upon the conclusion to be reached in the action. The intent of a person is sometimes difficult to prove, but it is nevertheless a fact and a material and existing fact that must be ascertained in many cases, and when ascertained determines the rights of the parties to controversies. The intent of Gillig was a material existing fact in this case, and the plaintiff's reliance upon such fact induced her to enter into a contract that she would not otherwise have entered into. The effect of such false statement by the defendant of his intention cannot be cast aside as immaterial simply because it was possible for him in good faith to have changed his mind or to have sold the property to another who might have a different purpose relating thereto. As the defendant's intention was subject to change in good faith at any time it was of uncertain value. It was, however, of some value. It was of sufficient value so that the plaintiff was willing to stand upon it and make the conveyance in reliance upon it. . . .

Unless the court affirms this judgment, it must acknowledge that although a defendant deliberately and intentionally, by false statements, obtained from a plaintiff his property to his great damage it is wholly incapable of righting the wrong, notwithstanding the fact that by so doing it does in no way interfere with the rules that have grown up after years of experience to protect written contracts from collateral promises and conditions not inserted in the contract.

We are of the opinion that the false statements made by the defendant of his intention should, under the circumstances of this case, be deemed to be a statement of a material, existing fact of which the court will lay hold for the purpose of defeating the wrong that would otherwise be consummated thereby.

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## HARLOW v. LA BRUN.

(Supreme Court of New York, 1894, 82 Hun. 292, 31 N. Y. Supp. 487.)

Mayham, P. J. The plaintiff brings this action for a dissolution of what he alleges to be a valid, existing copartnership between him and the defendant, and for an accounting as partners. The com-

plaint sets out written articles of copartnership. The answer does not deny the making of the written articles of copartnership, but impliedly admits the same, and sets up in a defense that he was induced to enter into such copartnership by the fraudulent representations of the plaintiff that a stock of merchandise which he put into such copartnership cost the sum of $1,890.05, an undivided half of which would belong to the defendant under such articles of copartnership, and against which defendant put in the sum of $850 in cash and his notes to the plaintiff of $1,150; and alleges that the merchandise in fact cost the plaintiff but the sum of $1,134, which fact the plaintiff well knew at the time of making such representations, and of which defendant was wholly ignorant. . . .

It is also urged by the learned counsel for the plaintiff that, as there was no proof that the stocks of goods were in fact worth less than $1,890.05, therefore the defendant had not by the proof suffered any loss, and that he was not, therefore, entitled to any relief. The representation in this case was not a mere representation by the plaintiff of the value of the property, which at most could but be an expression of his opinion, and for which no action would ordinarily lie. Chrysler v. Canady, 90 N. Y. 272; Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755. In such cases the party purchasing, or to whom the representation is made, has access to the open market to determine the value, and may exercise his own judgment as to the value. We think the rules are different whre fraudulent representation is made by the vendor as to the cost of a chattel. In Fairchild v. McMahon, 139 N. Y. 290, 34 N. E. 779, O'Brien, J., sharply recognizes the existence of such distinction, and in discussing this question of a distinction between an opinion by the vendor and false representation as to its cost says:

"But the question here is not one arising out of a representation as to value. The representation was with respect to a fact which might, in the ordinary course of business, influence the action and control the judgment of the purchaser, namely, the price paid for the property about to be sold by the vendor; . . . and so we think a false statement with respect to the price paid under such circumstances which is intended to influence the purchaser, and does influence him, constitutes a sufficient basis for the finding of fraud;" citing in support of that contention: Sandford v. Handy, 23 Wend. 260; Van Epps v. Harrison, 5 Hill, 63; Smith v. Countryman, 30 N.

Y. 655; Hammond v. Pennock, 61 N. Y. 151; Goldenberg v. Hoffman, 69 N. Y. 326.

Nor can we agree with the contention of the learned counsel for the plaintiff that, as no pecuniary damage was proved by the defendant, he is not entitled to any relief in this action. The relation of partners is one implying the highest degree of mutual confidence. By such relation each becomes the custodian, not only of the property, but to a great degree of the character and business standing of the other. For the court, therefore, in an equitable action, to uphold a contract consummated by fraud, and thus, as between the deceiver and deceived, to bind the property and character of the latter, would seem to be not only inequitable, but oppressive. Nor should the relation be continued until the injured and deceived party has been subjected to actual loss, which he may prove, in dollars and cents. When he appeals to the court for relief, and establishes the fraud, he should be relieved from the hazard of a business combination into which he has been inveigled by fraud and misrepresentation. We think, therefore, that the trial court was right in declaring this contract void and inoperative from its inception, and by the judgment of the court restore as far as possible the status quo of these parties. We have carefully examined all the exceptions taken by the learned counsel for the plaintiff to the rulings, findings, refusals to find, and determinations of the trial judge, and find no error for which this judgment should be reversed. Judgment affirmed, with costs. All concur.

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## VANDERBILT v. MITCHELL.

(New Jersey Court of Chancery, 1907, 72 N. J. Eq. 910, 67 Atl. 97.)

DILL, J. . . . A court of equity is the only tribunal which can afford adequate relief to the complainant under the peculiar and somewhat novel circumstances of this case, and that regardless of whether *certiorari* or *mandamus* would afford him relief in certain respects.

The complainant properly invokes the aid of a court of equity, on the ground of its inherent jurisdiction over frauds, to annul and cancel a fraudulent certificate, based upon the false statements of the wife as to the paternity of the child, filed by a public officer,

which certificate, by force of the statute, has such evidential character that it is *prima facie* evidence of the facts therein contained, and which, unless attacked by competent evidence, becomes conclusive to prove the facts therein recorded.

As we view the *gravamen* of the bill, the complainant does not seek a decree dissolving any existing valid status, thereby altering the actual relation of the parties, but a judicial determination of the matter of the alleged status of paternity *prima facie* created by this certificate, to determine that such alleged status does not exist and to give adequate relief.

In other words, the theory upon which the equity of the bill rests is not to establish a status, or, on the other hand, to disestablish a status, except for the special object of determining whether the information given to the physician by the wife was fraudulent, and whether thereupon the certificate itself, so far as it imputes to the complainant the paternity of the child, was fraudulent.

The relief sought is a decree expunging from the public records of this state, on the ground of fraud, the certificate of birth, or so much thereof as relates to and charges upon the complainant the paternity of the child, with an injunction against all parties who might issue copies or use such copies or the original certificate as evidence of such paternity.

The character of the recorded certificate, by whom prepared and filed, and its force and effect as evidence, are fixed by statute. P. L. 1888, p. 52. See, also, P. L. 1900 p. 370 ch. 150 §§ 28, 29.

The act of 1888, requiring the filing of certificates of birth, makes it the duty of the attending physician, within thirty days after a birth, to make, and cause to be transmitted to the superintendent of the bureau of vital statistics, a certificate thereof, which certificate shall set forth particularly, as far as the facts can be obtained by the physician, among other things, the date and place of birth, the name of each of the parents, the maiden name of the mother, the name of the child, and the name of the attending physician, and by section 13 of this act it is provided that:

"any such original certificate, or any copy thereof certified to be a true copy under the hand of said medical superintendent, shall be received in any court of this state to prove the facts therein contained."

It is important to note that the legislature evidently had not in mind the possibility that this statutory record might be made an instrument to effectuate a fraud. Section 11 of the act of 1888 (P. L. 1888 p. 59) provides that any minister of the gospel, magistrate, physician, midwife, or other person, who shall knowingly make any false certificate of marriage, birth or death, shall be deemed guilty of a misdemeanor, but there is an absence of statutory provision for the correction, modification or annulment of the record in case either of fraud or mistake.

As to the force and effect of the certificate, whether it is an adjudication by the physician of the facts which it recites, or whether it is a mere statement by such physician of facts which have been recited to him, is unnecessary for us to determine. If it be an adjudication, then, so far as the determination of the father of the child is concerned, it was obtained by a false representation made to the officer by the mother. If, on the other hand, it is a mere recital by the physician of a statement made to him by the mother, then that false statement has, by force of the statute, become spread upon the record of the state as the truth.

In either event, the complainant has been fraudulently recorded as the father of this child, and the recorded statement is evidential against him in all matters where the question of the paternity of the child is involved. In an action to compel him to support the child, or an action for necessaries furnished to the child, a certified copy of this record would be *prima facie* evidence that would tend to establish his liability, not only in this state, but in other jurisdictions as well. Speaking generally, this certificate is also evidence upon the question of who shall inherit an individual's estate, a question of vital importance to every man, having also a direct bearing upon the possible issue of a second marriage should he desire to contract one. But with this topic we deal later. Upon the question of equity jurisdiction it may be said that the jurisdiction of a court of equity to cancel, annul and set aside judgments on the ground of fraud, as well as certificates and determinations of public officers charged with judicial or executive functions, is settled. . . .

Where a public record is pronounced fraudulent, the relief is not confined to an injunction forbidding its use, but the decree may direct

a cancellation of the record upon the face thereof. Fenton v. Way, 44 Iowa, 428; Jones v. Porter, 59 Miss. 628; Randazzo v. Roppolo, post.

An officer making or having in his possession the record may be made a party to a suit to set it aside, although he is not charged with any fraud and is faithfully performing his public duties, and may be enjoined by the decree. . . .

Upon the whole case, we are of the opinion that the court of chancery has jurisdiction to afford the complainant ample and complete relief, as already indicated in this opinion; that, should the court of chancery refuse relief under the circumstances stated in the bill, it would cease to be a court of equity governed by principles of natural justice, especially where property rights may be said to be threatened and personal rights are clearly invaded.

The decree sustaining the demurrer is reversed.

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## LININGTON v. STRONG ET AL.

(Supreme Court of Illinois, 1883, 107 Ill. 295.)

MR. JUSTICE DICKEY. . . . The doctrine is well settled, that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry "negligence," as against his own deliberate fraud. Even where parties are dealing at arms' length, if one of them makes to the other a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth, and such statement is *known to be false* by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested reprsentations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and as between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying

that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care. . . .

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## SANGER v. WOOD.

(Court of Chancery of New York, 1818, 3 Johns. Ch. 416.)

THE CHANCELLOR. The bill states that the plaintiffs sued at law under that last contract, and which was, of course, in affirmance of it; and that, a few days before the trial at the *Madison* circuit, they discovered the fraud now set up as a ground to rescind that contract. And yet, notwithstanding that discovery, they go to trial in the suit on that contract, and take a verdict for the moneys due from the defendant under it, and, afterwards, judgment is entered up by them on that verdict; and, in *April* last, they even apply to this court for leave to take out execution at law on the judgment so recovered. The last motion was, indeed, made on the ground that it might not prejudice their rights in this suit; but I am induced to think they had already waived those rights by their previous proceedings. The suit at law, and the action here, are inconsistent with each other, since the one affirms, and the other seeks to disaffirm, the contract in question. It is probable the amount of the judgment may have been already collected, and the plaintiffs could not, for a moment, be permitted to keep the moneys recovered under that contract, if they should succeed in their bill to have it annulled. In a case where the remedies sought are so absolutely repugnant to each other, the plaintiffs ought to have made their election at once, after they came to the knowledge of the facts. If they meant to have disannulled the contract of *April,* 1816, then it was vexatious, as well as useless, to have gone on to a trial, and judgment and execution. They had no right to try the experiment how much they could recover at law under the contract (for the bill admits the suit at law was brought upon that agreement), before they elected to waive it, and then, retaining their verdict and entering judgment at law, apply to this court to set the contract aside. This proceeding would be giving the plaintiffs a double advantage, and is unreasonable and inadmissible.

Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and in-

consistent remedies. If he take out a commission of bankruptcy, he cannot sue the bankrupt at law, for that would be again superseding the commission. (Ex parte Ward, 1 Atk. 153; Ex parte Lewes, 1 Atk. 154). So, charging a party in an execution at law after a commission issued, is an election to take the remedy at law, and the party must abide by it. (Ex parte Warder, 3 Bro. 191; Ex parte Cator, 3 Bro. 216). So, again, if a party seeks relief in equity by bill waiving a forfeiture at law, though he fail in obtaining relief, he cannot afterwards insist on the forfeiture at law. (1 Sch. & Lef. 441).

There cannot be any doubt of the principle that equity will not relieve a party fully apprized of his rights, and deliberately confirming a former act. The doctrine has been again and again declared. (3 P. Wms. 294, note E, &c.; 1 Atk. 344; 1 Ball and Beatty, 340). And I consider the going to trial in the action at law, and especially the entry of judgment afterwards upon the verdict, as a decided confirmation of the settlement in *April,* 1816.

I shall, accordingly, dismiss this bill; but from the opinion which I have formed upon the merits of the transaction, I am not willing to charge the plaintiffs with costs; and I shall consequently dismiss the bill without costs.

Order accordingly.

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## HAMMOND v. PENNOCK.

(New York Court of Appeals, 1874, 61 N. Y. 145.)

DWIGHT, C. . . . The case has thus far been considered as though the fraud requisite as a basis for rescinding a contract in equity is the same in nature as that demanded in a court of law in an action for damages for deceit. In equity, the right to relief is derived from the suppression or misrepresentation of a material fact, though there be no intent to defraud. (Per Lord Romilly, in Peek v. Gurney, L. R. (13 Eq.), 79, 113; Wilcox v. Iowa University, 32 Iowa, 367). This view has been applied to innocent misrepresentations in a prospectus, providing that they were of the essence of the contract. (Smith v. Reese River Co., L. R. (2 Eq.), 264; Kennedy v. Panama Co., L. R. (2 Q. B.), 580). This doctrine is, substantially,

grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the opposite party to the contract. It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made. (1 Story on Eq. Jur., Sec. 193, and cases cited; Perry on Trusts, Sec. 171).

There can be no doubt that, in this aspect of the case, the defendant obtained the property of the plaintiff through misrepresentations which are material, even though it be assumed that they were made without bad intent on his part.

Assuming that there was evidence from which fraud could be found, the next inquiry is, whether the court, acting as a court of equity, should have rescinded the contract. It is objected on the part of the defendant that the plaintiff did not act promptly and restore, or offer to restore, what he received under the contract. It is, undoubtedly, a general rule of law, that a party who would rescind a contract, upon the ground of fraud, must act promptly and restore, or offer to restore, to the other party what he received under it. But this rule only means that he must restore what he himself has received, and has, by force of the contract, under his own control. If the wrong-doer has, by his own act, complicated the case, so that full restoration cannot be made, he has but himself to blame. No one, perhaps, has stated this qualification more satisfactorily than the late Judge Beardsley, in Masson v. Bovet (1 Denio, 69) ; he there said: "If a party defrauded would disaffirm the contract, he must do so at the earliest practicable moment after the discovery of the cheat. That is the time to make his election, and it must be done promptly and unreservedly. He must not hesitate; nor can he be allowed to deal with the subject-matter of the contract and afterward rescind it. The party who would disaffirm a fraudulent contract, must return whatever he has received upon it. This is on a plain and just principle. He cannot hold on to such part of the contract as may be desirable on his part and avoid the residue, but must rescind *in toto,* if at all.

"It was urged on the argument, that a contract cannot be rescinded by one of the parties, alone, so as to authorize a recovery by him of what had been paid on it, unless the other party is thereby fully restored to the condition in which he stood before. This is certainly the general rule, but in cases of fraud it can only mean that the party de-

frauded, if he would rescind the contract, must return, or offer to return, everything he received in execution of it. To retain the whole, or a part only, of what was received upon the contract, is incompatible with its rescission.

"This is not exacted on account of any feeling of partiality or regard for the fraudulent party. The law cares very little what his loss may be, and exacts nothing for his sake. If, therefore, he has so entangled himself in the meshes of his own knavish plot that the party defrauded cannot unloose him, the fault is his own, and the law only requires the injured party to restore what he has received, and, as far as he can, undo what had been done in the execution of the contract. This is all that the party defrauded can do, and all that honesty and fair dealing require of him. If this fail to extricate the wrong-doer from the position that he has assumed, it is in no sense the fault of his intended victim, and upon the principles of eternal justice whatever consequences may follow should rest on the head of the offender alone." . . .

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## SUMMERS v. GRIFFITHS.

(In Chancery, 1865, 35 Beav., 27.)

By deed, dated the 18th of *July*, 1853, *Mary Lloyd* (since deceased), in consideration of 40 pounds conveyed a tithe rent-charge of 8 pounds per annum, issuing out of a farm called *Colston,* to the Defendant *William Griffiths,* "his heirs and assigns."

*Mary Lloyd,* an old illiterate widow, was then in her eighty-ninth year, but in possession of all her faculties, and she kept a public-house in *Fishguard.* One witness represented her as being very correct in business, "and very much alive to her own interests in money matters. She was a very intelligent and clear-headed woman, and, having regard to her advanced age, sharp and active, both in mind and body." She had no professional advice on the occasion, and the deed was prepared by the Defendant's solicitors. The value of the fee-simple of this tithe rent-charge (if a good title were shewn to it) was admitted to be twenty-years' purchase or 160 pounds. . . .

The Master of the Rolls. . . . I am of opinion that the plaintiff is entitled to a decree.

The state of the case, as put by the Defendant himself, is, that an old woman, of the age of eight-nine, in distress for money, and having a doubt about the title to the property, comes to him and asks him to buy it at one-fourth or one-fifth of its value, and that she, having no species of legal assistance of any sort, makes that offer to him. He assents, and buys it at that amount, having at the time in his hands the title to her property, and knowing or having the means of knowing exactly what her title was, and having told her, at first, that she could make no title to it, or that if she was entitled to it her husband probably was not, he having the deed probably shewing how long the husband had had the property, and that she had then had thirty years uninterrupted possession of the rent-charge. Thereupon he buys the property for one-fourth its value. This is the most favorable mode of stating the case, and I am then asked to say, that if the matter were fresh, this is a transaction which can be supported, and the only reason urged why it can be supported is that the bill charges fraud. No person, I think, has been more strict than I have in endeavouring to repress the improper uses of the word "fraud" in regard to transactions which are neither of an improper nor an immoral character,—I mean immoral in the sense of taking advantage of a person who does not know what the value of his property is. I do not understand the distinction on the subject taken in the case of *Harrison v. Guest*. There appears to me to be distinct fraud in this case, and on that ground I am of opinion that the Plaintiff is entitled to recover.

It is true the Plaintiff has put forward another case on the bill, which is, that *Mary Lloyd* intended to sell her life interest only, and there is some ground for that suggestion on the evidence; but here is this man, who knows everything about the title, and who admits (in the state of circumstances I have mentioned) that he allowed this old woman to sell the property to him for one-fourth its value, she believing there was a defect of title. If that be not fraud I am at a loss to know what the meaning of the word "fraud" is, in the proper and legal sense of the word. If a person comes to me and offers to sell to me a property which I know to be of five times the value he offers it for, he being ignorant of his rights and in the belief that he cannot make out a title, while I know that he can, and I conceal that knowledge from him, is not that a *suppressio veri*, which is one of the elements which constitute a fraud?

I am of opinion that the Plaintiff in this case is entitled to a decree to set this deed aside, on payment to the Defendant of the principal sum and interest after deducting the tithes he has received. The Plaintiff must pay the cost of the other Defendants, because, in my opinion, they ought all to have joined as co-plaintiffs.

There is this also to be observed with respect to the question of time, that ten years have elapsed, and this old lady took no steps in her lifetime. She died in 1862, and neither the son nor his assignee took any steps until *March,* 1864, when the bill was filed. But, then, I observe that there are persons who are interested in remainder, some of whom are infants and cannot be bound by that lapse of time, though it is absolutely necessary that there should be some limit to these cases.

It is true, as Mr. *Jessel* says, that mere inadequacy of value is not a sufficient ground for setting aside a transaction. But how far is that to go, is there to be no such inadequacy of value as can amount to evidence of fraud? Lord *Thurlow* said, that to set aside a conveyance, there must be an inequality, so strong, gross and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. Tried by this test, I am satisfied that most men of common sense would exclaim at the inequality, when they found that an old woman of eighty-nine had sold property for one-fourth of its value because she was in distress, and that without any legal assistance and without any person letting her know that she could make out a good title and obtain four or five times that amount.

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## SECTION III. DURESS AND UNDUE INFLUENCE

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### UNITED STATES, LYON, ET AL v. HUCKABEE.

(Supreme Court of the United States, 1872, 16 Wall. 414.)

Mr. Justice Clifford. . . . Duress, it must be admitted, is a good defence to a deed, or any other written obligation, if it be proved that the instrument was procured by such means; nor is it necessary

to show, in order to establish such a defence, that actual violence was used, because consent is the very essence of a contract, and if there be complusion there is no binding consent, and it is well settled that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient in legal contemplation to destroy free agency, without which there can be no contract, because in that state of the case there is no consent. Unlawful duress is a good defense to a contract if it includes such degree of constraint or danger, either actually inflicted or threatened and impending, as is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness. Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or loss of goods, can be avoided on that account, as such threats it is said are not of a nature to overcome the will of a firm and prudent man; but many other decisions of high authority adopt a more liberal rule, and hold that contracts procured by threats of battery to the person, or of destruction of property, may be avoided by proof of such facts, because, in such a case, there is nothing but the form of a contract without the subsance. Positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may undoubtedly be, in many cases, sufficient to overcome the mind and will of a person entirely competent, in all other respects, to contract, and it is clear that a contract made under such circumstances, is as utterly without the voluntary consent of the party menaced, as if he were induced to sign it by actual violence; nor is the reason assigned for the more stringent rule, that he should rely upon the law for redress, satisfactory, as the law may not afford him anything like a sufficient and adequate compensation for the injury. . .

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## MORSE v. WOODWORTH.

(Supreme Court of Massachusetts, 1891; 155 Mass., 233, 27 N. E. 1010.)

Knowlton, J. . . . The only remaining exceptions relate to the requests of the defendant and the rulings of the court in regard to duress. The plaintiff contended that he gave up the notes and signed the release under duress by threats of imprisonment. The question of

law involved is whether one who believes and has reason to believe that another has committed a crime, and who, by threats of prosecution and imprisonment for the crime, overcomes the will of the other, and induces him to execute a contract which he would not have made voluntarily, can enforce the contract if the other attempts to avoid it on the ground of duress.

Duress at the common law is of two kinds, duress by imprisonment and duress by threats. Some of the definitions of duress per minas are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress, as well as threats of grievous bodily harm. The rule as to duress per minas has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily.

To set aside a contract for duress it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect. It must also be shown that the other party to the contract is not, through ignorance of the duress or for any other reason, in a position which entitles him to take advantage of a contract made under constraint without voluntary assent to it. If he knows that means have been used to overcome the will of him with whom he is dealing, so that he is to obtain a formal agreement which is not a real agreement, it is against equity and good conscience for him to become a party to the contract, and it is unlawful for him to attempt to gain a benefit from such an influence improperly exerted.

A contract obtained by duress of unlawful imprisonment is voidable. And if the imprisonment is under legal process in regular form, it is nevertheless unlawful as against one who procured it improperly for the purpose of obtaining the execution of a contract; and a contract obtained by means of it is voidable for duress. So it has been said that imprisonment under a legal process issued for a just cause is duress that will avoid a contract if such imprisonment is unlawfully used to obtain the contract. Richardson v. Duncan, 3 N. H. 508. See also Foshay v. Ferguson, 5 Hill, (N. Y.) 153; United States v. Huckabee, 16 Wall. 414, 431; Miller v. Miller, 68 Penn. St. 486; Walbridge v. Arnold, 21 Conn. 424; Wood v. Graves, 144 Mass. 365, and cases cited.

It has sometimes been held that threats of imprisonment, to constitue duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case, there is no reason way one should be bound by a contract obtained by force, which in reality is not his, but another's.

We are aware that there are cases which tend to support the contention of the defendant. Harmon v. Harmon, 61 Maine, 227; Bodine v. Morgan, 10 Stew. 426, 428; Landa v. Obert, 45 Texas, 539; Knapp v. Hyde, 60 Barb. 80. But we are of opinion that the view of the subject heretofore taken by this court, which we have followed in this opinion, rests on sound principles, and is in conformity with most of the recent decisions in such cases, both in England and America. Hackett v. King, 6 Allen, 58. Taylor v. Jaques, 106 Mass. 291; Harris v.

Carmody, 131 Mass. 51; Bryant v. Peck & Whipple Co. 154 Mass. 460. Williams v. Bayley, L. R. 1 H. L. 200; S. C. 4 Giff. 638, 663, note; Eadie v. Slimmon, 26 N. Y. 9; Adams v. National Bank, 116 N. Y. 606; Foley v. Greene, 14 R. I. 618; Sharon v. Gager, 46 Conn. 189; Bane v. Detrick, 52 Ill. 19; Fay v. Oatley, 6 Wis. 42.

We do not intimate that a note given in consideration of money embezzled from the payee can be avoided on the ground of duress, merely because the fear of arrest and imprisonment, if he failed to pay, was one of the inducements to the embezzler to make the note. But if the fact that he is liable to arrest and imprisonment is used as a threat to overcome his will and compel a settlement which he would not have made voluntarily, the case is different. The question in every such case is, whether his liability to imprisonment was used against him, by way of a threat, to force a settlement. If so, the use was improper and unlawful, and if the threats were such as would naturally overcome the mind and will of an ordinary man, and if they overcame his, he may avoid the settlement. The rulings and refusals to rule were correct.

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## DUNN v. DUNN.

(New Jersey Court of Chancery, 1886, 42 N. J. Eq. 431.)

MAGIE, J. . . . When two parties stand toward each other in any relation which necessarily induces one to put confidence in the other, and gives to the latter the influence which naturally grows out of such confidence, and a sale is made by the former to the latter, equity raises a presumption against the validity of the transaction. To sustain it the buyer must show affirmatively that the transaction was conducted in perfectly good faith, without pressure of influence on his part, with complete knowledge of the situation and circumstances, and of entire freedom of action on the part of the seller. When the confidential relation is that of attorney and client, the attorney, who buys, must also show that he gave to his client, who sells, full information and disinterested advice. In the leading case of Gibson v. Jeyes, 6 Ves. 266, Lord Eldon said: "The attorney must prove that his diligence to do the best for his vendor has been as great as if he was only an attorney dealing for that vendor with a stranger." Chancellor Walworth said:

"The attorney can never sustain a purchase of this kind without showing that he communicated to his clients everything which was necessary to enable them to form a correct judgment of the actual value of the subject of the purchase, and as to the propriety of selling at the price offered, and his neglect to ascertain the true state of the facts himself will not sustain his purchase." Howell v. Ransom, 11 Paige 538. . .

Upon Holt's appeal, the first question is whether there existed a confidential relation between Holt and the complainant respecting the bond and mortgage. I think the conclusion reached by the vice-chancellor in this respect was entirely correct. Holt was a well-known attorney, and held the bond and mortgage in his possession for a long time, collecting the interest for complainant, for which service he was paid a stipulated compensation. He had advanced her $550 and taken her note therefor, with an absolute assignment of the bond and mortgage as security. When the obligors became insolvent, he went to Philadelphia, where complainant lived, and gave her a statement of the situation of affairs. She called on him in Trenton. At these and other interviews she asked for and obtained from him information respecting the lien of her mortgage and its relation to other mortgages on the same premises—facts necessarily affecting the value of her security. The information was such as would naturally be sought from an attorney, and it was imparted by Holt as if in recognition of her right to such service. The whole circumstances clearly indicate that complainant looked on Holt as her adviser, and that he acknowledged her right to do so. I have no doubt at all that a confidential relation did exist, and that it was the relation of attorney and client.

Nor is there anything in the claim urged here that this relation had ceased to exist when Holt made this purchase. When the existence of such a relation has once been established by proof, it will be presumed to continue, unless its cessation is shown. Kerr on Fraud, 153. The contention is that complainant, by appointing Murphy her agent to sell the bond and mortgage, put an end to the confidential relation with Holt. But this is obviously not to be conceded. The agency of Murphy was not at all inconsistent with the relation of his principal and her attorney, nor could it relieve that attorney from any of his obligations or duties to his client. Where a client had become bankrupt, a purchase by his solicitor from the trustee in bankruptcy has been held to be incapable of enforcement. Peard v. Morton, L. R. (25 Ch. Div.) 394.

Holt was therefore properly held to have been complainant's attorney at the time he acquired from her the bond and mortgage, and to sustain his purchase he must show the requisites which equity exacts in such transactions. These requisites, as we have seen, are, on his part, perfect good faith, absence of the pressure of the influence acquired by the confidential relation, and the imparting of full information and disinterested advice to the client respecting the transaction—on her part, complete knowledge of the circumstances and entire freedom of action.

We are not required to determine that the attorney actually failed in the performance of these required duties. The invalidity of the transaction will result from a judicial determination that he has failed to show that he performed those duties. . . .

## SECTION IV. ILLEGALITY—BREACH OF CONTRACT

### BATTY v. CHESTER.

(In Chancery, 1842, 5 Beav. 103.)

The Master of the Rolls. This bill prays that a deed, dated the 1st of May 1841, may be declared to be in equity void, and may be delivered up to be cancelled; and that the Defendants, the trustees named in the deed. may be restrained from prosecuting an action against the Plaintiff. The bill states, in substance, that the Plaintiff formed an illicit connection with a woman of immoral conduct; that, with a view to that connection, and in consideration of prospective cohabitation, he agreed to make a provision for her during the cohabitation, but no longer; that the deed, which was prepared, and which he executed, was so framed as to secure a permanent provision for the woman, and was, in that respect, contrary to the plaintiff's agreement; that some time after the execution of the deed the woman left the Plaintiff to live with another man; that by her such conduct, the Plaintiff, according to the terms of the agreement, became wholly released from every obligation to her; but that she, relying on the in-

accuracies in the deed, had prevailed on the trustees to proceed at law against the Plaintiff, to compel him to perform his covenants. The Plaintiff complains of this; and in a letter to the woman, which he has set out in his bill, he alleges that "reciprocity was a positive and substantial essential" of the arrangement. The meaning of this and the grounds of complaints are obvious; and although the Plaintiff has occasionally, in the course of his bill, stated the deed to be voluntarily made for an immoral consideration, and void, yet it is plain that the bill and the Plaintiff's title to relief rests, in part at least, upon the supposed injustice of his being required to perform his covenants after he has lost the consideration for which he entered into them. In substance, the Plaintiff alleges, that he ought not to be required to perform his covenants, because he has lost the cohabitation,— the reciprocity, that is, the immoral connection or services which the woman agreed to afford him. . . .

In this bill the plaintiff claims relief, in part at least, upon the ground that he is released from his obligation by the woman having ceased to live an immoral life in connection with him; and I am of opinion, that upon a bill so framed the Plaintiff can have no relief. Let the demurrer be allowed.

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## DUVAL v. WELLMAN.

(New York Court of Appeals, 1891, 124 N. Y. 156, 26 N E. 343.)

Brown, J. . . . It appears from the evidence that the plaintiff is the assignee of Mrs. E. Guion, a widow lady, who, in her search for a husband, sought the advice and aid of the defendant, who was the owner and publisher of a matrimonial journal called "The New York Cupid," and the proprietor of a matrimonial bureau in New York city.

Mrs. Guion's testimony was to the effect that in June, 1886, she became a patron of the defendant's establishment, and paid the usual registration fee of five dollars. That she was introduced to thirty or forty gentlemen, but found none whom she was willing to accept as a husband, and that in June, 1887, for the purpose of stimulating the defendant's efforts in her behalf, she paid him fifty dollars, whereupon there was executed the following instrument:

"June 2nd, 1887.

"Due Mrs. Guion from Mr. Wellman fifty dollars ($50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars ($50.00) is due Mr. Wellman from Mrs. Guion.

"(Signed,) H. B. WELLMAN.
"E. GUION."

In August, 1887, Mrs. Guion, not finding a congenial companion among any of the men to whom she had been introduced and claiming to be willing to give up all acquaintance with them, demanded from defendant the return of the money paid, which, being refused, the claim was assigned to plaintiff and this action was commenced. . . .

The question in this and kindred cases, therefore, must always be whether the parties are equal in guilt. Obviously cases might arise where this would clearly appear and where the court would be justified in so holding as a matter of law, as where there was an agreement between two, having for its purpose the marriage of one to a third party, the parties would be so clearly *in pari delicto* that the courts would not aid the one who paid money to the other in the promotion of the common purpose, to recover it back. Such a case would partake of the character of a conspiracy to defraud. So if two parties entered into a partnership to carry on such a business as defendant conducted, the courts would not lend their aid to either to enforce the agreement between them.

But where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced and public interests promoted.

Contracts of this sort are considered as fraudulent in their character and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence. . . .

We are of the opinion, therefore, that it was error to hold as a legal conclusion that the parties to the contract in question were equal in guilt. . . .

Our opinion is that the same reasons that have induced courts to declare contracts for the promotion of marriage void, dictate with equal force that they should be set aside and the parties restored to their original position. To decide that money could not be recovered back would be to establish the rules by which the defendant and others of the same ilk could ply their trade and secure themselves in the fruits of their illegal transactions. . . .

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## WAMPLER v. WAMPLER.

(Court of Appeals of Virginia, 1878, 30 Gratt. 454.)

This was an appeal from the decree of the circuit court of Bland county dismissing a bill filed by Abraham Wampler against his son, Ephraim Wampler, to set aside a deed which the plaintiff and his wife had executed, conveying a tract of land to the said Ephraim Wampler. The defendant demurred to the bill. . . .

Christian, J. . . . Upon the demurrer, of course, all the allegations of the bill must be taken as true. It is plain that the plaintiff did not have a complete and adequate remedy at law. The consideration for the deed of conveyance for the land, as alleged in the bill, was the comfortable support of the grantor and his wife during their lives, and the erection on the land conveyed of a good and comfortable house. This was a continuing obligation on the part of the grantee. It was to continue during the lives of the grantors and each of them. At the end of the first year, or sooner, the grantors had the right of action, if the covenant for support was not complied with, for a breach of the covenant. In such action damages could be recovered only for the refusal of the grantee to perform his covenant *up to the time of the commencement of the suit.*

But the obligation for support and maintenance continued for an indefinite time, during the lives of the grantors and each of them; it may be for ten or twenty years. Must the grantors bring their suit every six months or twelve months for damages for a failure upon the

part of the grantee to supply them with food and clothing? And in the meantime, having conveyed their all to the grantee, having deprived themselves of the means of support, must they suffer and starve until by suits at law and executions they could compel the grantee to supply them with the means of support?

But beside the consideration of support and maintenance, another consideration alleged in the conveyance (and this upon demurrer must be taken to be true) was that the grantee should erect upon the land a comfortable dwelling. How could this covenant, so important to the comfort of the grantees, be enforced in a suit at law?

We think that it is clear that the grantors in this case did not have a complete and adequate remedy at law, and that upon the facts stated in the record, admitted by the demurrer to be true, a court of equity had the undoubted jurisdiction, there being no complete and adequate remedy at law, if not to compel a specific performance of the contract on the part of the grantee, certainly to rescind the contract, annul and set aside the deed, and put the parties in the same position they were in before the contract was made and the deed delivered. . . .

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## MATTHEWS v. CROWDER.

(Supreme Court of Tennessee, 1902, 111 Tenn., 737.)

Mr. Justice Caldwell delivered the opinion of the Court.

This is a bill to rescind an executed sale of land. On the 18th of April, 1899, Daniel Crowder and his wife sold 16 2-3 acres of land to W. F. Matthews for the sum of $300. All parties believed, and Crowder and wife represented, that they owned the land absolutely in fee. Their deed of conveyance to Matthews was absolute in terms, and contained full covenant of seisin and warranty of title. For the consideration Matthews executed two promissory notes, which Crowder and wife assigned to J. F. Bailey in the purchase of another tract of land, which contained 35 acres, and Matthews paid the notes.

In October, 1899, Matthews discovered that Crowder and wife had misrepresented their title; that they in fact had only a life estate in the land sold to him as aforesaid; and because of that fact, and the further fact that Crowder and wife were insolvent, Matthews, on the

16th day of that month, brought this bill, seeking a rescission. He offered to restore the tract he had purchased, and sought a recovery for the $300 paid; and to satisfy that recovery, if not otherwise paid, he sought to have both tracts sold, first the life estate in the 16 2-3 acres, and then the 35 acres, if necessary. . . .

The decree is correct. It is true the vendee in an executed sale of land cannot, before eviction, maintain a suit to rescind for a mere breach of the warranty of title, for in that case he is presumably protected by that covenant in his deed; but when insolvency of the vendor, as in this instance, is superadded to such breach, that protection is dissipated, and the vendee, in consequence thereof, may have a decree for rescission, though not yet evicted. . . .

# CHAPTER VIII. BILLS QUIA TIMET AND TO REMOVE CLOUD ON TITLE

## SECTION I. CANCELLATION OF CONTRACTS

### GALE v. LINDO.

(High Court of Chancery, 1687, 1 Vern., 475.)

The case was, that when a marriage was treating between one Gringer and the sister of William Pitman, the woman not having so great a portion as the man insisted upon, she prevails with her brother Pitman to let her have 160 pounds to make up her portion, and gave him bond for re-payment of it; and thereupon the marriage was had; and the husband, who knew nothing of the bond, died without issue, and his wife survived him, and afterwards died having made her will, and the plaintiff executor. William Pitman the brother dies, and makes the defendant his executor, who put the bond in suit against the plaintiff, as executor of the widow, to recover back the 160 pounds and thereupon he brings his bill to be relieved.

For the defendant is was insisted, that although this might be a fraud, as against the husband or any issue of his, who are to have the benefit of the marriage agreement; yet the husband being dead, and there being no issue, this bond is good against the woman herself, and by consequence against her executor, there being no creditors in the case, or any deficiency of assets pretended.

Lord Chancellor. You admit the husband might have been relieved on a bill brought by him and his wife; that which was once a fraud, will be always so; and the accident of the woman's surviving the husband will not better the case. Decreed the bond to be delivered up, and a perpetual injunction against it.

Quære.—If the condition of the bond had been, that in case the woman survived her husband, that she should repay it, whether she could have been relieved?

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## PAPKE v. HAMMOND CO.

(Supreme Court of Illinois, 1901, 192 Ill., 631, 61 N. E. 910.)

Mr. Justice Magruder. . . . It seems to be well settled that, when the signature to an instrument under seal is procured by false representations, the nature of the instrument being fully understood by the party signing it, the effect of such instrument can only be avoided by a separate proceeding in equity.

Perhaps the leading case upon this subject in this country is the case of George v. Tate, 102 U. S. 564, where the Supreme Court of the United States say: "It is well settled that the only fraud, permissible to be proved at law in these cases, is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. . . . The remedy is by a direct proceeding to avoid the instrument." in an action at law a written release, of the character of that here introduced in evidence, cannot be impeached for fraud, not inhering in the execution thereof, but which only goes to the extent of the consideration. In Vandervelden v. Chicago and Northwestern Railway Co., 61 Fed. Rep. 54, it was said: "In the States where the two systems of jurisprudence prevail,—of equity and the common law,—a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed. Fraud in the execution of the instrument has always been admitted in a court of law; as, where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence.

(Hartshorn v. Day, 19 How. 211). . . . It is, therefore, necessary, where the party desires to escape the legal bar created by a written instrument by him duly executed, knowing, at the time of execution, its legal effect, and especially where the other party has performed the contract on his part, that the remedy should be by means of a direct proceeding to avoid the instrument, or, in other words, by a proceeding in equity. Until the instrument is annulled by a decree to that effect in a further proceeding, its legal effect remains unimpaired. It stands between the parties as a valid legal contract of settlement; and, in an action at law upon the original cause of action, the defendant may plead and rely upon it, and the court of law is bound to construe it and enforce it according to its legal effect. The legal effect of the release in this case is to bar the action of the plaintiff." (Shampeau v. Connecticut River Lumber Co. 42 Fed. Rep. 760; Kosztelnik v. Bethlehem Iron Co. 91 id. 606.) . . .

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## ROBERTS v. CENTRAL LEAD CO.

(Missouri Appeal Court, 1902, 95 Mo. App. 581, 69 S. W. 630.)

Barclay, J. This suit presents two distinct phases defined by two counts of the petition. Plaintiff was injured while in the employ of defendant as a miner, and he executed a document which defendant relies upon as a release of liability. The first count of plaintiff's petition aims to cancel the document on grounds to be mentioned more fully presently, while the second count states a case for the recovery of damages for personal injuries caused by negligence alleged. . . .

"Seventh. Plaintiff admits and states, that he signed said pretended release without any knowledge of its true character and purpose, and states that he signed it under the mistaken belief or misapprehension that it was a receipt for money.

"Eighth. And further states, that at the time of signing said pretended release he was suffering great mental and physical pain, that his mind in consequence thereof, and of taking and having taken prior thereto large and frequent does of opiates in one form and another to temper his sufferings, aforesaid, was clouded and impaired, so much so that he did not comprehend his acts, and did not realize, not having

heard read said pretended release, and not being able to read it, what he had done, when he signed said pretended paper. . . .

We consider that the petition states a good cause of action for the cancellation of the document in question. If plaintiff was reduced by his injury and the necessary treatment thereof to the physical extremity portrayed in the petition, he was not in a fit or competent condition to assume the obligation of release expressed in the instrument, in the circumstances described.

It is immaterial that plaintiff might have interposed the same facts as a bar to defendant's use of the document as a defense to plaintiff's claim as is held might be done in Courtney v. Blackwell, 150 Mo. 245. That privilege would not exclude plaintiff's right to invoke the ancient jurisdiction of equity to eliminate by cancellation the paper as an impediment to the enjoyment of his rights, its invalidity not appearing on its face. Dunn v. Miller, 96 Mo. 324; Pomeroy Eq. Juris. (2 Ed.), sec. 1377.

In this State the practice pursued in this case has been sanctioned from a date as early at least as the decision in Blair v. Railroad, 89 Mo. 382, and is unquestionable law. The enactment of a late statute touching the mode of pleading and practice, where such a document is interposed as a defense (R. S. 1899, sec. 654), does not abrogate the jurisdiction of equity to cancel such instruments, there being no intent exhibited by the enactment to accomplish such abrogation. The remedial jurisdiction of equity is not destroyed by the passage of a measure creating a statutory remedy at law in like circumstances, in the absence of an expression of legislative purpose to extinguish the ancient jurisdiction. Woodward v. Woodward, 148 Mo. 241. . . .

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## THORNTON v. KNIGHT.

(Cases in Chancery, 1849, 16 Sim. 509.)

The insurers of a ship having brought an action on the policy, against the underwriter, the latter filed the bill in this Cause, for a discovery in aid of his defence to the action, alleging that the ship had deviated on her voyage, and also that she was unseaworthy when the policy was effected, and praying for an injunction to restrain the action, and

that the policy might be delivered up to the underwriter to be cancelled. The injunction was obtained for want of answer, but was dissolved on the answer coming in. At the trial of the action, the underwriter proved the deviation, and obtained a verdict on that ground; but failed in proving unseaworthiness. . . .

The VICE CHANCELLOR. The bill alleges two grounds for the relief which it asks, namely, deviation and unseaworthiness. In support of the former, the Plaintiff relies on the verdict which he has obtained at Law; but he has produced nothing, whatever, in support of the latter.

If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers, when they effected it, as to the seaworthiness of the ship, was false, I could have interfered; for then a case of fraud would have been made out against the insurers. But I cannot interfere on the mere ground of deviation, unless this Court has a concurrent jurisdiction with a Court of Law, in all cases in which relief is sought against instruments like the one in question. That, however, is not so; and, therefore, I shall dismiss the bill with costs.

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## COOPER v. JOEL.

(In Chancery, 1859, 27 Beav. 313.)

THE MASTER OF THE ROLLS. After reading the evidence very carefully I have come to the conclusion that the Plaintiff is entitled to a decree. It was, in the first place, contended, on behalf of the Defendants, that the Court had no jurisdiction to order the instrument in question to be delivered up; but I am of a different opinion. The principle upon which the Court orders a legal instrument to be delivered up is well expressed in Simpson v. Lord Howden (a), and the authorities there cited. That principle may be thus stated:—If a legal instrument has stated on the face of it the defect which makes it impossible to sue at law, this Court will not interfere; but, if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person

(a) 3 Myl. & Cr. 97.

to proceed at law upon it, or if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument from loss of the evidence necessary for his defense at law to be unable to make available, then this Court will interfere and order the instrument to be delivered up to be cancelled. To use the words of Lord *Cottenham* (b), the Court orders such documents to be delivered up in consequence of "the danger that the lapse of time might deprive the party to be charged upon it of the means of defence." I am, therefore, of opinion that the Court has jurisdiction in this case, because there is no legal defect apparent on the face of this guarantee. . . .

The case is this:—There were five executions upon five judgments, and the sheriff who had taken possession of the lady's property, which was considered of great value, was about to sell it. The Plaintiffs and three other persons went to the execution creditor and said "we will give you a guarantee for the debts, payable by installments, provided you consent to stop the sale," and thereupon the execution creditor did consent. But, when they came to the auctioneer, it appeared that their consent was not sufficient to stop the sale, and that it required the consent of other persons. Accordingly, the auctioneer did not stop the sale, and two hours later, on the same day, the persons who had given the guarantee gave notice that as the sale was going on the guarantee was at an end. Now the first question is, what were the rights of the parties? I am of opinion that the guarantee was at an end, and that it is impossible to say that the guarantee was to be given in case the execution creditor consented to stop the sale, although such consent was ineffectual to produce the object for which it was given. The common sense and *bona fides* of the transaction is, provided they could, by means of such consent, stop the sale. The guarantee proceeded upon a common understanding between them, that the consent would be effectual for that purpose. The object was to stop the sale, not to make the execution creditor utter some unmeaning words. Accordingly, I think that being unable to stop the sale, the notice given by them that the guarantee was at an end was effectual. . . .

In that state of circumstances, I think that the Defendants could not succeed at law, and that this would have been a good defence to the

(b) Ibid. 102.

actions. But, as the case which is made by the Defendants, upon the affidavits, confessedly or professedly is, that the proceedings at law are only suspended, as they say "for the present," their argument being, that they may sue again upon a fresh installment under the guarantee becoming due, I am of opinion (referring again to the principle laid down by Lord *Cottenham* in the case I have referred to) that as lapse of time might deprive the Plaintiffs chargeable upon this document of the means of defence, and as the Defendants may hold it, and profess to hold it, for the purpose of suing at a future time, this Court ought to interfere and direct it to be delivered up.

Therefore I must make a decree to the effect, and the costs must follow the event.

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## VANNATTA v. LINDLEY.

(Supreme Court of Illinois, 1902, 198 Ill. 40, 64 N. E. 735.)

Mr. Justice Wilkin delivered the opinion of the court: This is a bill in equity by appellants, against appellees, to have a promissory note, and power of attorney to confess judgment thereon, decreed null and void and delivered up to be cancelled; also to enjoin appellees from entering judgment thereon. . . .

The principal question involved in the case is whether the complainants had a complete remedy at law, on the theory of their bill that the note was a forgery or that its execution was obtained by fraud and circumvention. It is well understood that a forged note is by the common law absolutely void, even in the hands of an innocent purchaser for value, unless it has in some way been ratified by the payor named in it, and our statute provides "that if any fraud or circumvention be used in obtaining the making or executing of any of the instruments aforesaid, (that is, negotiable instruments,) such fraud or circumvention may be pleaded in bar to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee of such instrument." (Hurd's Stat. 1899, chap. 98. sec. 10.) The defense, therefore, against a forged promissory note, or one the execution of which has been obtained through fraud or circumvention, by the

payee, is complete and adequate in an action at law. (Ehler v. Braun, 120 Ill. 503; Easter v. Minard, 26 id. 494; Richardson v. Schirtz, 59 id. 313; Sims v. Bice, 67 id. 88.) That equity will not in such a case take jurisdiction for the purpose of ordering the surrender or cancellation of a note is also held in Black v. Miller, 173 Ill. 489. . . .

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## MOECKLY v. GORTON.

(Supreme Court of Iowa, 1889, 78 Iowa 202, 42 N. W. 648.)

This is an action in equity, by which the plaintiff demands that the defendants be enjoined from transferring, selling, or in any manner disposing of, a certain money order bank check, and for a decree declaring said check to be null and void, and cancelling the same. There was a demurrer to the petition, which was overruled, and a decree was entered as prayed. The defendants appeal.

ROTHROCK, J.—The petition is in these words: "The plaintiff states (1) That heretofore, to-wit, on or about the twenty-seventh day of November, 1886, the plaintiff, at the request of one Julius A. Kuntz, a justice of the peace and mayor of Polk City, Iowa, went to his (said Kuntz') office, and there met said Kuntz and the defendant Wm. Gorton, at which time and place said defendant accused this plaintiff of having committed the crime of perjury in the evidence given by him as a witness upon the trial of the cause of Geo. W. Miles against said Wm. Gorton, before C. P. Holmes, a referee appointed to hear and determine said cause by the circuit court of Iowa, in and for Polk county, in which court said cause was pending; and said Gorton, at said time and place, further stated that, by reason of said perjury and false swearing of which he accused this plaintiff, he (said Gorton) has lost the sum of five hundred dollars, and that, unless this plaintiff paid him (said Gorton) said sum of five hundred dollars, or give him his promissory note therefor, said Gorton would, on the following Monday morning, go before the grand jury of Polk county, Iowa, and cause this plaintiff to be indicted for the crime of perjury. (2) That plaintiff, relying upon said Gorton's promise not to take any action in regard thereto, did execute and deliver to said Wm. Gorton his promissory note for the sum of two hundred and fifty dollars, pay-

able to the order of the wife of said Gorton, the defendant Mary D. Gorton. (3) That no consideration for said note passed from either said Wm. Gorton or said Mary D. Gorton to this plaintiff, and that it was executed and delivered by this plaintiff for no purpose or consideration whatever, except to avoid being criminally prosecuted on a charge of which he was not guilty, as aforesaid. (4) That plaintiff was fearful that said defendant would transfer said note to an innocent purchaser, who would have the legal right to enforce collection thereof against this plaintiff, and, believing that his check, drawn upon a bank where he had no funds, would not be negotiable, he did, under the advice of said Kuntz, draw his check on the Des Moines Saving Bank for the sum of two hundred and fifty dollars, payable to said Mary D. Gorton, and delivered the same to said Kuntz, who soon after returned to this plaintiff said note. (5) That he is unable to state whether said check is payable to said Mary D. Gorton, or order, or bearer, but he avers that, according to his best recollection, it is negotiable. (6) That the only consideration for said check was the surrender of said note. (7) That neither Mary D. Gorton nor Wm. Gorton is financially responsible, and, should they transfer the said check to an innocent holder, plaintiff would be without remedy. Wherefore, plaintiff asks that a writ of injunction may issue restraining said Mary D. Gorton and said Wm. Gorton from transferring, selling, or in any manner disposing of, said check, or allowing it to pass from their possession; and that, upon the final hearing of this cause, said check be decreed to be null, void and cancelled; that defendants be ordered to surrender the same for cancellation; that said injunction be made perpetual; that plaintiff recover his costs, and have such other and further relief and remedy as may be just and equitable."

The demurrer was upon the ground that the facts stated in the petition do not entitle the plaintiff to the relief demanded. Counsel for appellants contends that the note was a valid contract, because the promise of William Gorton to refrain from instituting criminal proceedings for the perjury was not an illegal consideration. It is further claimed that the parties to the transaction were *in pari delicto,* and neither is entitled to the aid of a court to prevent its enforcement. Whatever may be thought of the above propositions of law contended for by counsel, they can have no application in this case, because it appears from the averments of the petition that the plain-

tiff herein was not guilty of the perjury of which he was accused. This being conceded by the demurrer, the note was without any consideration whatever, and was absolutely void as between the parties thereto. It was executed to avoid a criminal prosecution upon a charge of which the maker of the note was not guilty. And the bank check given in exchange for the note was a mere change of the form of the void obligation. No new rights accrued by the exchange; and, Mary Gorton having given no consideration for either the note or the check, they are as invalid in her hands as they would have been if made payable to William Gorton. We think the demurrer was properly overruled. Affirmed.

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## GLASTONBURY v. ADM'R. OF McDONALD.

(Supreme Court of Vermont, 1872, 44 Vt., 450.)

Ross, J. The orator asks that the order for $500, given by Jeremiah McDonald and John W. McDonald, as selectmen of the orator, and dated May 25, 1861, may be ordered to be surrendered and cancelled, as having been obtained and given through the fraud of Property McDonald, and of his father and brother, the selectmen who signed the order. The order was given in settlement of a suit then pending against the town in favor of Property McDonald, to recover for injuries alleged to have been received by him through the insufficiency of a highway, which it was the duty of the town to maintain and keep in repair. We have had no difficulty in finding, from the evidence, that the order was obtained and given in fraud of the rights of the orator; and that in giving the order Jeremiah McDonald and John W. McDonald acted in accordance with a pre-arranged plan for that purpose, and not honestly in their capacity of selectmen. Notwithstanding this, the defendant insists that the court of chancery should not interfere, because Property McDonald had, before the commencement of this proceeding, brought a suit at law on the order, and another small order to which no defense is claimed; and because the orator could avail itself of fraud as a defense to the order in the suit at law. In support of the claim that the court of law should be allowed to retain jurisdiction of this matter, the case, Bank of Bellows Falls v. Rutland & Burlington R. R. Co. et als., 28 Vt., 470, is

much relied on by the defendant. The general doctrine as stated in that case is well established, that a court of equity will not interfere in cases of fraud where a court of law has first taken jurisdiction, and where the party asking the intervention of the court of chancery can have as full and complete remedy against the fraud in the court of law. The court, however, recognize the right of the court of chancery to intervene and order an instrument sought to be enforced in a court of law, which has been procured by fraud, delivered up and cancelled, in a proper case. The cases are not entirely harmonious in respect to the rule which should govern the court of chancery in such intervention. The rule laid down by Chancellor Kent in Hamilton v. Cummings, 1 John. Ch., 517, is perhaps the most complete rule on the subject, and is approved of by the learned judge who pronounced the opinion of the court in the case in 28 Vt., Chancellor Kent, after reviewing most of the leading cases on the subject up to that time, says: "Perhaps the cases may all be reconciled on the general principle, that the exercise of this power is to be regulated by sound discretion as the circumstances of the individual case may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense, not arising upon its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort to chancery proper and clear of all suspicion of any design to promote expense and litigation."

The defendant has raised the question by demurrer to the bill. He has thus allowed the testimony to be taken in full, on both sides, and the case to be fairly heard on its merits, before the question of jurisdiction has been brought to the attention of the court. So far as the discretion of the court is to be influenced by the prolongation of litigation and increase of expense, the circumstances of the case would favor the taking of jurisdiction by the court, rather than refusing it. If the court refuse to take jurisdiction, another trial of the question of fraud must be had, with the increased expense necessarily attending such a trial. If the defendant would have urged increased litigation and expense on the court as a motive for not assuming jurisdiction, he should have raised the question, *in limine,* by demurring to the bill.

The order is negotiable in the broadest sense, being payable to bearer, and is drawn upon the treasurer of the town, and regular upon

its face. Although it is overdue, the orator would be embarrassed if it should be negotiated. The orator is a corporation, and can act only through its officers, and can have remedy against such officers only for malfeasance or misfeasance in the discharge of their duties. If the treasurer of the town—this court having dismissed the bill for want of jurisdiction, and without finding that the order was tainted with fraud—should assume to pay the order, the order, in a suit against the treasurer, would be burthened, not only with proving the other fraudulent, but also with showing that the treasurer acted corruptly in paying the same.

We think the circumstances bring the case within the rule as laid down by Chancellor Kent. If the evidence left the fact of fraud in doubt, the case might merit a different, consideration. The *pro forma* decree dismissing the bill is reversed, and the case is remanded to the court of chancery, with a mandate to enter a decree for the orator, ordering the order of May 25, 1861, for $500, surrendered and cancelled. This order will not affect the suit at law, so far as it is based upon the other order. From the consideration that the suit at law for the alleged injury upon the highway was discontinued by the giving of the order for $500, we have thought best to make the orator's right to the above order conditional upon the orator's consenting that the discontinuance may be stricken off, and that suit be brought forward on the docket for trial if the defendant desires it.

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## SECTION II. BILLS TO REMOVE CLOUD ON TITLE

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### DAY COMPANY v. THE STATE.

(Supreme Court of Texas, 68 Tex. 526; 4 S. W. 865.)

STAYTON, ASSOCIATE JUSTICE. This action was brought by the State of Texas through the Attorney General and the district attorney of the judicial district in which Greer county is embraced. The purpose of the suit is to establish the right of the State to one hundred and forty-four thousand six hundred and forty acres of land, situated

in Greer county, and to cancel the patents under which the appellant asserts title to the land. The land was located and patented by virtue of land certificates issued under the act of March 15, 1881, (General Laws 35), which provided for the issuance of land certificates in favor of the surviving soldiers of the Texas revolution and others. . . .

It is also urged that, if the patents are void, there is no necessity for relief; as a court will not do a useless thing, therefore it will not cancel the patents. As said by a distinguished author, this rule "leads to the strange scene, almost daily witnessed in the courts, of defendants urging that the instruments under which they claim *are void, and therefore that they ought to be permitted to stand unmolested;* and of judges deciding that the court can not interfere, *because the deed or other instrument is void;* while, from a business point of view, every intelligent person knows that the instrument is a serious injury to the plaintiff's title, greatly depreciating its market value; and the judge himself, who thus repeats the rule, would neither buy the property while thus affected nor loan a dollar upon its security. This doctrine is, in truth, based upon mere verbal logic, rather than upon considerations of justice or expediency." (3 Pomeroy's Equity, 1399.)

The rule insisted upon proceeds, not upon the theory, that the court has not power to remove cloud from title by the cancellation of an instrument which evidences the adverse claim, even though it be void, but upon the theory that the court refuses to exercise the power it has, when it clearly appears that its exercise can accomplish no useful purpose; and that, by its refusal to act, the person who calls upon it to exercise its power will suffer no injury by its refusal to do so. If such a rule as is insisted upon can have just application in any case, it would seem to be only in a case in which, from the face of the paper, which is the basis of the claim asserted to be a cloud upon title, no man of ordinary intelligence would, in acting in relation to the subject matter of controversy, be influenced by the claim asserted to be void, for it is only in such case that injury would not result from even a void claim.

The rule thus limited would, however, be too uncertain to furnish the basis for judicial action in granting or refusing relief, and we are of the opinion that the better rule is that, notwithstanding an instrument may be void upon its face, a court has power, which it must

exercise, not only to declare the instrument void, but to cancel it where a defendant asserts claim under it.

A defendant who asserts claim even under an instrument void on its face, can not be heard to say that it has not such semblance of validity as to create a cloud upon the title to property which it professes to convey, that will prejudice the right of the real owner if it be not removed. He can not be heard to say that others will not attach to it the same degree of faith and credit as a title-bearing instrument, which he in good faith gives to it, and that, to the extent of the doubt or cloud thus cast upon the real title, its holder is injured, or is likely to be injured. . . .

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## LYTLE v. SANDEFUR.

(Supreme Court of Alabama, 1891, 93 Ala., 396, 9 So. 260.)

McClellan, J. . . . The purpose of the bill is to correct the mistake of description in the several deeds, to remove the cloud thereby cast upon complainants' title, and to enjoin the action at law. . . .

For the purpose of relief by way of removing a cloud from the title of the complainants the bill is wholly lacking in equity. What we have already said will suffice to indicate the grounds of our opinion that Mrs. Sandefur has no title, legal or equitable, in the land, but only a right of action in respect to it. It is not conceivable, in the nature of things, that any state of facts in regard to the title, any character of muniments evidencing *prima facie* title to the others, could be said in any sense to shade and obscure that which has no existence. The title of the other complainants, which, according to the theory of the bill, is clouded by reason of the fact that the land in question was inadvertently embraced in the deeds of the Slosses, Mrs. Sandefur, and Dansby, respectively, came to them by descent from their father, James L. Sandefur. It is alleged that he was seized in fee of the land at the time of his death. All of the deeds which are now sought to be canceled on the ground that they constitute a cloud on this title were executed subsequent to his death. There is no pretense that any person who succeeded in any way to the title of James L. is a party to any one of these deeds or nominally bound by them. There is no pre-

tense that any party to any of these deeds had or has any title or color of title as against the title of said heirs. On this state of averment, these apparent muniments do not constitute a cloud on the title of the heirs. The test, as laid down by this court, is this, as applied to the present case: Would these heirs, in an action of ejectment, founded upon either of said deeds, be required to offer evidence to defeat a recovery? If the proof would be unnecessary, no shade would be cast on their title by the presence of the deed. If the action would fall by its own weight, without proof in rebuttal, no occasion could exist for equitable interposition. Rea. v. Longstreet, 54 Ala. 294. It is said in this case: "A court of equity will not interpose to prevent or remove a cloud which can only be shown to be *prima facie* a good title by leaving the complainant's title entirely out of view. It is always assumed, when the court interposes, that the title of the party complaining is affected by a hostile title apparently good, but really defective." In an action based on the title supposed to be conferred by the deeds which are alleged to be a cloud on the title of the heirs, against them, the plaintiff's case would fall of its own weight because of a failure of his proof to draw to himself the prior and superior title, which was vested in James L. Sandefur in life, and passed *eo instante* into the defendants at his death. The title, in other words, is not even apparently good against the heirs, would not be admissable in defense to ejectment by them, and would fall short of establishing a *prima facie* valid claim of the title in ejectment against them, even if their own title were not adduced in evidence at all. The authorities concur to the point that such nominal muniments can in no sense be said to constitute a cloud to the removal of which equity jurisdiction may be invoked. . . .

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## FROST v. SPITLEY.

(Supreme Court of the United States, 1886, 121 U. S. 552.)

This case, so far as is material to the understanding of the appeal was a bill in equity by Martin Spitley, a citizen of Illinois, against George W. Frost and wife, citizens of Nebraska, Thomas C. Durant, a citizen of New York, and The Credit Mobilier of America, a cor-

poration of Pennsylvania, alleging that the plaintiff was entitled to two lots of land in the city of Omaha, county of Douglas, and State of Nebraska, under a sale on execution against Frost to one John I. Redick, and a conveyance from Redick to the plaintiff, and praying for a decree quieting the plaintiff's title and ordering a conveyance to him of the legal estate.

MR. JUSTICE GRAY. . . . At the time of the sale on execution of Frost's interest in the land, the legal title was, and it still remains, in Durant. Although Frost, under his agreement with Durant and the corporation, and the decree which he had recovered against them, had been entitled to a deed of the land upon the payment of a certain sum of money, he had not paid the money, nor had any deed been delivered to him; so that his title, either by virtue of the agreement and decree, or by virtue of his occupation of the land as a homestead, never was anything more than an equitable title. The sale on execution against him (if valid and effectual) and the deed of the marshal passed only his equitable title to Redick; Redick's payment to Durant of the money unpaid by Frost did not divest Durant of his legal title; and Redick's subsequent conveyance to Spitley could pass no greater right than Redick had. Spitley's title, therefore, at best, is but equitable, and not legal, and Frost, and not Spitley, is in actual possession of the land.

Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon title, and to quiet the possession of real estate, is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and legal title in the plaintiff. Alexander v. Pendleton, 8 Cranch, 462; Piersoll v. Elliott, 6 Pet. 95; Orton v. Smith, 18 How. 263; Crews v. Burcham, 1 Black, 352; Ward v. Chamberlain, 2 Black, 430. As observed by Mr. Justice Grier in Orton v. Smith, "Those only who have a clear legal and equitable title to land, connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title." 18 How. 265. A person out of possession cannot maintain such a bill, whether his title is legal or equitable; for if his title is legal, his remedy at law, by action of ejectment, is plain, adequate and complete; and if his title is equitable, he must acquire the legal title, and

then bring ejectment. United States v. Wilson, 118 U. S. 86; Fussell v. Gregg, 113 U. S. 550.

It is possible that one who holds land under grant from the United States, who has done everything in his power to entitle him to a patent, (which he cannot compel the United States to issue to him,) and is deemed the legal owner, so far as to render the land taxable to him by the state in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession. Carroll v. Safford, 3 How. 441, 463; Van Wyck v. Knevals, 106 U. S. 360, 370; Van Brocklin v. Tennessee, 117 U. S. 151, 169. But no such case is presented by the record before us. . . .

A statute of Nebraska authorizes an action to be brought "by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate." Nebraska Stat. February 24, 1873, Rev. Stat. 1873, p. 882. By reason of that statute, a bill in equity to quiet title may be maintained in the Circuit Court of the United States for the District of Nebraska by a person not in possession, if the controversy is one in which a court of equity alone can afford the relief prayed for. Holland v. Challen, 110 U. S. 15, 25. The requisite of the plaintiff's possession is thus dispensed with, but not the other rules which govern the jurisdiction of courts of equity over such bill. Under that statute, as under the general jurisdiction in equity, it is "the title," that is to say, the legal title to real estate that is to be quieted against claims of adverse estates or interests. In State v. Sioux City & Pacific Railroad, the Supreme Court of Nebraska said, "Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action." 7 Nebraska, 357, 376. And in Holland v. Challen, above cited, this court said, "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises."

The necessary conclusion is, that Spitley, not having the legal title of the lots in question, cannot maintain his bill for the purpose of removing a cloud on the title; he cannot maintain it for the purpose of compelling a conveyance of the legal title, because Durant, in whom that title is vested, though named as a defendant, has not been served

with process or appeared in the cause; and for like reasons Frost and wife cannot maintain their cross bill.

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## STEUART v. MEYER.

(Court of Appeals of Maryland, 1880, 54 Md. 454.)

ALVERY, J. The plaintiffs in this cause filed their bill to have set aside and declared void a certain tax sale of a lot of ground and improvements thereon, in the City of Baltimore, as having been illegally made, for State and city taxes assessed for the years 1871 and 1874; and which sale, and the proceedings that have taken place thereon, have created, as it is alleged, a cloud upon the title to the property, which the plaintiffs seek to have removed. . . .

If the sale is so fatally defective as to be insufficient to vest a good title to the property in the purchaser, every reason would seem to require that the plaintiffs should have ample and speedy remedy to be relieved of the obstacle created by the collector's proceedings to the full enjoyment of their rights, and that the cloud upon the title to the property should at once be removed. They are interested only in the annual ground rents, and in the estate of the reversion; they are not entitled to the possession, and could not, therefore, sue in ejectment for the recovery of the property. Under the circumstances of this case, without resort to a proceeding like the present, the parties would be without adequate remedy for relief against the effect of the prima facie title in the purchaser. In such cases, equity asserts complete jurisdiction to remove the cloud from the title of the property involved, and to prevent unnecessary and vexatious litigation. Holland v. City of Baltimore, 11 Md., 186, 197; Polk v. Rose, 25 Md. 153, 161, 162; Carroll v. Safford, 3 How., (U. S.,) 441, 463; Thomas v. Gain, 35 Mich., 155; 2 Sto. Eq. Juris., secs. 694, 700.

But, as a condition upon which this equitable jurisdiction should be exercised, for the relief of the plaintiffs, they should be required to pay, or bring into Court to be paid, to the party entitled to receive it, the full amount of the taxes in arrear at the time of the sale by the collector together with the interest accrued thereon to the time of payment and also all taxes that have subsequently accrued due on the

property, with interest; and upon the full payment of such sums, the plaintiffs should then have the relief prayed by them. This requirement in regard to the payment of taxes is substantially in accordance with what would have been required if the sale, as reported to the Circuit Court of the City, had been excepted to, and had been set aside, and a re-sale made by the collector. Act of 1874, ch. 483, sec. 51. And we think it but right that the relief sought in this proceeding should be granted only on substantially the same terms as those prescribed by the statute, where the sale is set aside by the Court to which it is reported. When, therefore, the plaintiffs pay, or bring into Court to be paid, the sums due for taxes, they will be entitled to a decree, declaring the sale and the order of confirmation thereof, to be null and of no effect, and that the deed of the collector be cancelled; and they will also be entitled to an account of the ground rents as prayed by them. And to the end that such relief may be afforded, we shall reverse the decree appealed from and remand the cause.

Decree reversed and cause remanded.

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## GARRISON v. FRAZIER.

(Supreme Court of Missouri, 1901, 165 Mo. 40; 65 S. W. 229.)

Robinson, J. The question involved on this appeal is the sufficiency of the petition filed, a demurrer to which was sustained by the court below.

The children of John B. Garrison, deceased, by a second marriage, and their mother, Martha Garrison, instituted this suit in the Christian Circuit Court against the defendants, children of John B. Garrison by a former marriage, to quiet title. . . .

The question for determination is: Is the Act of 1897, now section 650, Revised Statutes 1899, broad enough to authorize the court to determine advancements between remaindermen before the termination of the widow's life estate; or broadly stated, does the statute apply to parties claiming a remainder prior to the expiration of the intervening life estate?

Under this section, plaintiffs contend that this proceeding can be maintained by the children of the second marriage against their half-

brother and sisters by their father's first marriage, and this, too, during the intervening life estate of their mother, and that the court is authorized to inquire into advancements made to the defendants during the lifetime of the common ancestor, John B. Garrison. The defendants, on the other hand, urge that such advancements can not be settled in this kind of a proceeding, especially before the termination of the life estate.

Under the law as it stood prior to the present statute enacted in 1897, the plaintiffs would undoubtedly have been denied any standing in court. (Northcutt v. Eager, 132 Mo. 265; Webb v. Donaldson, 60 Mo. 394.) Upon the authority of these cases the petition would have been fatally defective. It is apparent that the Legislature, in view of such interpretation, deemed it advisable to enlarge the jurisdiction of the courts so as to furnish relief in a large class of cases which were not comprehended in the former statutes, and thereupon passed the statute under which the present suit was instituted, which provides that, "Any person claiming any title, estate or interest in real property, whether the same be legal or equitable, certain or contingent, present or in reversion or remainder, whether in possession or not, may institute an action against any person, having or claiming to have any title, estate or interest in such property, whether in possession or not, to ascertain and determine the estate, title and interest of said parties, respectively, in such real estate, and to define and adjudge by its judgment or decree the title, estate and interest of the parties severally in and to such real estate."

The manifest object of this section was to extend the operation of the statute over just such cases as this, and the mere fact that the plaintiffs and defendants are only claiming a remainder after the life estate of the widow, does not militate against the right to maintain the present suit.

In the recent case of Huff v. Land & Imp. Co., 157 Mo. 65, this court, in an opinion by VALLIANT, J., construing this statute, said: "The object of the statute is to allow a person who claims any estate to the land, either in possession or expectancy, without waiting to have his rights trespassed upon, to call anyone who claims an adverse interest into court to declare his claim, to the end that the court may then settle the title as between them." And so we think it can be said in this case, that under the broad and sweeping provisions of the present statute any person claiming an estate in reversion or re-

mainder may maintain a suit to quiet title against anyone having or claiming to have any adverse interest in the property, whether in reversion or remainder, and obtain an adjudication forever settling the title and interest of the parties respectively. . . .

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## McREE v. GARDNER.

(Supreme Court of Missouri, 1895, 131 Mo. 599, 33 S. W. 166.)

Macfarlane, J. This is a suit in equity to remove a cloud from plaintiff's title to one and a half acres of land situate in the city of St. Louis. The petition states that plaintiff is the owner in fee and is in the lawful possession of the land described. The title under which plaintiff claims is stated to be one acquired by adverse possession. . . .

We are of the opinion that the decided weight of the evidence supports the position of defendant that, when the suit was commenced, he was, and for nearly a year had been, in the exclusive actual possession of the property. The testimony of plaintiff himself sufficiently establishes this fact. The mere act of turning a cow into the premises before commencing the suit and removing bill boards therefrom did not give the necessary possession. At most these were but acts of trespass. Dyer v. Baumeister, 87 Mo. 137.

It is well settled in this state that when real estate is held adversely the statute of limitations operates upon the title, and when the bar is complete the title of the original owner is transferred to the adverse possessor. The title thus acquired is a legal title which can be protected by actions at law, where like actions would lie under a title by deed. Sherwood v. Baker, 105 Mo. 477; Harper v. Morse, 114 Mo. 323; Allen v. Mansfield, 82 Mo. 693.

Plaintiff avers in his petition no title except that derived through adverse possession. That title, if all other necessary conditions exist, is sufficient to authorize a suit in equity to remove a cloud from his title. This is expressly decided in Gardner v. Terry, 99 Mo. 524. But it is equally well settled in this state that a party claiming the legal title and being out of possession can not invoke equitable jurisdiction to remove a cloud from such title. Davis v. Sloan, 95 Mo. 553; Graves v. Ewart, 99 Mo. 18.

It appearing, then, that plaintiff was not in possession when he commenced his suit he can not maintain the action. . . .

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## KING v. TOWNSHEND.

(New York Court of Appeals, 1894, 141 N. Y. 358, 36 N. E. 513.)

Finch, J. The relief sought in this action is the cancellation of a lease executed and delivered by the comptroller of the city of New York upon a sale for unpaid taxes. It is admitted by the defendant, who is the assignee of the lease, that it is void because the sale included an illegal charge for interest. It would seem that such an admission should at once end the controversy and the lease be promptly cancelled, but some ulterior purpose appears to lie behind the apparent litigation, and serves to prolong it. For, notwithstanding the defendant's concession, he resists the relief sought upon the double ground that there is no cloud on the one hand and no title to be clouded on the other.

The claim that the lease constitutes no cloud is founded upon the provisions of the statute which make the lease inchoate; ineffective to produce a right of possession or establish a title; until a specified notice to redeem has been given to occupant or owner, and a certificate of which, signed by the comptroller, must accompany the record of the lease. (Laws of 1871, ch. 381, secs. 13, 14, 15 and 16.) It is undoubtedly true that, until that certificate is given, the right of the lessee is imperfect and no title passes by the conveyance. (Lockwood v. Gehlert, 127 N. Y. 241.) But if we concede that the imperfect and inoperative lease does not constitute an actual cloud it is nevertheless a decisive step towards the creation of a cloud and a threat and menace to create one in the future. Equity may interfere to prevent a threatened cloud as well as to remove an existing one. (Sanders v. Yonkers, 63 N. Y. 492.) It is true that, in such a case, there must appear to be a determination to create a cloud, and the danger must be more than merely speculative or potential. That was said of tax proceedings in which no lease had been given and there was no proof that the purchaser claimed or the city threatened it.

Here it has been given. Its very existence is a threat. It was not given for amusement or as an idle ceremony. It meant and could only

mean a purpose to subvert the title and possession of the owner. The further steps necessary to make the result effective lay wholly in the option of the lessee. If he actually served the necessary notice and filed the prescribed affidavit and satisfied the comptroller of those facts the certificate followed as a matter of course if not barred by a redemption. The lessee, therefore, in the present case stands with an effective weapon in his hands and may strike his blow when he pleases. It is in that respect that the situation differs from that in Clark v. Davenport (95 N. Y. 478). There the state comptroller had not given a deed and was not bound to give it. He might instead cancel the sale and could be compelled to do so. Here the city comptroller has given the lease and has no discretion left. If the grantee gives the notice and proves it, the comptroller must make the certificate. Nor is it an answer to say that for many years the lessee has omitted to give the notice. That only intensifies the injury and the danger. In Hodges v. Griggs (21 Verm. 280) a creditor's execution against land following an attachment had been allowed to sleep for seven or eight years, and equity required him to enforce his right or remove the threatened cloud. And so the defendant here has no right to maintain a threat of title as lessee, when he confesses that it is found on no legal right. The lease is something more than a certificate of sale. It is in form and terms a conveyance, effective at the option of the lessee if there be no redemption. The statute provides that "all such leases executed by the said comptroller and witnessed by the clerk of arrears, shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements for taxes or assessments, or Croton water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute." Such a lease, armed with such presumptions, effective at the option of the lessee, unless there is a redemption for his benefit drawing forty-two per cent of interest, and sufficient to prevent any sale of the property and cloud the owner's right, cannot be said to be a mere speculative danger.

Nor is it true that the invalidity of the lease appears upon its face. It shows no details of the amounts for which the sale was made, and the presumptions attending it make proof of such details unessential to the right of the lessee. It is only by evidence outside of the lease itself that its invalidity can be made to appear.

I think, therefore, that enough was shown to justify the intervention of equity to cancel the lease even if considered only as a threat to create a cloud, and if the action be regarded as one not to remove but to prevent a cloud. . . .

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## ASHURST v. McKENZIE.

(Supreme Court of Alabama, 1891, 92 Ala. 484, 9 So. 262.)

McClellan, J. There are suggestions in the present bill looking to relief by way of quieting and removing a cloud from complainant's title to the land in controversy; but neither the averments nor proof are sufficient to authorize such relief. . . .

As to removing a cloud from complainants' title, the suggestion is equally lacking in averment and proof. There is no allegation or evidence of any muniment of title, proceeding, written contract, or paper showing any color of title in the defendant, which could cast a shadow on the title of complainants to any part of the land. There is no overlapping of description in the muniments held by either. The lands of complainants and defendant join. The line which separates them is in dispute, and is to be determined by evidence *aliunde.* Each admits that the other has title up to his line, wherever it may be, and the title papers of neither fix its precise location; so that there is no paper the existence of which clouds the title of either party, and nothing could be delivered up and cancelled under the decree of the court undertaking to remove a cloud. . . .

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## SANXAY v. HUNGER.

(Supreme Court of Indiana, 1873, 42 Ind. 44.)

Osborn, C. J. The appellee instituted an action against the appellant to establish and perpetuate an easement in adjoining lands, and to enjoin him from disturbing the appellee in the enjoyment of such easement. . . .

The appellant was the owner of the land over which the right of way or easement was alleged to exist. In other words, the appellee was the owner of the dominant, and the appellant was the owner of the servient estate. If the appellant disputed the appellee's right, and was about to deprive him of it, we think he had a right to have it established, and to enjoin the appellant from disturbing him in its enjoyment.

The appellee claimed that he had such an interest in the real estate occupied by the right of way as gave to him an action under sec. 611, 2 G. & H. 284, to quiet his title when disputed; that it was appurtenant to his farm, an incorporeal hereditament. We do not consider it necessary to base it upon that section. If we did, perhaps we should hold that he would be within its spirit.

When the claim set up by one to an interest in land appears to be valid on the face of the record, and the defect can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony, it presents a case invoking the aid of a court of equity to remove it as a cloud upon the title. Crooke v. Andrews, 40 N. Y. 547; 1 Story Eq., sec. 711. So a bill for an injunction will lie when easements or servitudes are annexed by grant or otherwise to private estates. 2 Story Eq., sec. 927. In this case the fee of the land was admitted to be in the appellant, subject to the easement claimed. There was no record evidence of the right claimed by the appellee. The appellant denied the existence of any way or easement, and was threatening to interrupt the appellee in the use and enjoyment of it.

He had placed upon record a notice that he disputed and would dispute such right. It was important to the appellee to have his right ascertained and established, whilst the persons who were acquainted with the facts were alive. They would soon die, but the record of his notice would be perpetual. And the record of such a notice would be a perpetual menace to him and a cloud upon his title and right of way to his farm. It needs no argument to show that it would injure the value of the farm. Without a way to it, the land was comparatively valueless. No prudent man would give as much for it, with the way and access to it disputed and clouded with the record of that notice, as he would if it was undisputed or established by the judgment of a court. In the face of such a record, the fact

that it had been used for twenty years would not quiet the apprehensions of the buyer, when the evidence of it rested entirely in the memory of witnesses, some of whom were more than eighty years old. One who would buy and pay a full price for a farm under such circumstances would manifest an amazing confidence in the recollection and testimony of witnesses, verdicts of juries, and judgments of courts. The demurrer was correctly overruled. . . .

## STATE EX REL. DOUGLAS v. WESTFALL.

(Supreme Court of Minnesota, 1902, 85 Minn. 438, 89 N. W. 175.)

START, C. J. . . . The sole issue of law raised by the demurrer is this: Is Laws 1901, c. 237, by virtue of which the respondent was appointed such examiner, providing for the Torrens system of registering land titles, constitutional? . . .

Actions and proceedings to conclusively establish rights and titles against all claimants and parties, known and unknown, are not novelties in our jurisprudence, for decrees probating wills, distributing estates of deceased persons, quieting title to real estate against unknown heirs and unknown parties, have been repeatedly held to be conclusive on the whole world. It is now the settled doctrine of this court that the district courts of this state may be clothed with full power to inquire into and conclusively adjudicate the state of the title of all land within their respective jurisdictions after actual notice to all of the known claimants within the jurisdiction of the court, and constructive notice by publication of the summons to all other persons or parties, whether known or unknown, having or appearing to have some interest in or claim thereto. The proceeding provided for by the act in question is such a one. It is substantially one in rem, the subject-matter of which is the state of the title of land within the jurisdiction of the court, and the provisions of the act for serving the summons and giving notice of the pendency of the proceeding are full and complete, and satisfy both the state and federal constitutions. To hold otherwise would be to hold that the courts of this state cannot in any manner acquire jurisdiction to clear and quiet the title to real estate by a decree binding all interests and all

persons or parties, known or unknown, for the provisions of this act are as full and complete as to giving notice to all interested parties as it is reasonably possible to make them. That the courts of this state have jurisdiction to so clear and quiet title by their decrees is not longer an open question in this state. . . .

## SECTION III. OTHER QUIA TIMET RELIEF

### LANGWORTHY v. CHADWICK.

(Supreme Court of Connecticut, 1838, 13 Conn. 42.)

This was a bill in chancery for an injunction and security. . . .

On the 24th of January, 1835, the personal property belonging to the testator's estate, amounting to 1837 dollars, was distributed according to the provisions of the will. To the defendant, during the time she should remain single and unmarried, there was distributed the use of the following personal property, viz., five shares of the stock of the Phoenix Bank, in Hartford, at 540 dollars; two shares of the New London and Lyme turnpike stock, at 12 dollars; a note against Nathaniel S. Perkins and Thomas S. Perkins, at 517 dollars; part of a note against Thomas S. Perkins at 41 dollars; and diverse articles of household furniture, amounting to the sum of 1224 dollars. The same property, which was so distributed to the defendant, during her widowhood, was set to the plaintiff, Julia Ann, (who had, since the testator's death, become the wife of George F. Langworthy) forever after the termination of the defendant's use.

The defendant was requested by the plaintiffs, through their agent, to make some arrangement, by which the property distributed to her during her widowhood, might be secured in such a manner that they could have the benefit of it, when she had done with it; but she refused to do so; and also refused to give her word, that the property should not be so used that they could not have the benefit of it, whenever they should be entitled to it, unless she needed it for her own support. . . .

BISSELL, J. The only question in this case, is, whether upon the facts found by the superior court, the plaintiffs are entitled to the relief sought by their bill. It is now too well settled to admit of dispute, that a remainder in personal chattels, dependant on an estate for life, may be created by grant or devise; and it is equally well settled, that the interest so created would be protected in chancery.

It was formerly held, that the person entitled in remainder might call for security from the legatee for life, that the property should be forth-coming at his decease. Vachel v. Vachel & al. 1 Chan. Ca. 129. Hyde v. Parratt & al. 1 P. Wms. 1. Bill v. Kinaston, 2 Atk. 82, Leeke v. Bennett, 1 Atk. 471. Ferrard v. Prentice, Ambl. 273. But this practice has been overruled; and chiefly on the ground that to decree such security would be improperly to interfere with the will of the testator. And the course now is, for the remainderman to call for the exhibition of an inventory, to be signed by the legatee for life, and deposited in court.

When, however, it can be shown, that there is danger that the property will be either wasted, secreted or removed, a court of chancery will interfere to protect the interest in remainder, by compelling the tenant for life to give security. And such we suppose to be the well settled practice in Westminster-Hall. Foley & al. v. Burnell & al. 1 Bro. Ch. Ca. 279. Batten v. Earnley, 2 P. Wms. 164. Slanning & al. v. Style, 3 P. Wms. 335. 1 Mad. 178. 2 Fearne, 35, Williams on Executors 859. Rous v. Noble, 2 Vern, 249. Indeed, the same regard to the intention of the testator, which forbids a court of chancery to decree that security shall be given, where there is no danger, would seem to require such interference, where that intention is likely to be defeated, by the conduct of the devisee for life. This highly reasonable principle has been recognized in this country, and was fully adopted, by this court, in the case of Hudson v. Wadsworth & al. 8 Conn. Rep. 348.

See also 2 Sw. Dig. 154. 2 Kent's Com. 287. 2 Paige 123.

The case, it is conceded, is to be governed by Hudson v. Wadsworth, if the facts found bring it within the principle of that case: and upon this point it is impossible to entertain a doubt. The facts in this case are much stronger than that: for not only is the defendant found to be irresponsible, and to have removed out of the state, but she has also removed beyond the jurisdiction of the court whatever of the

property she could control, and has repeatedly threatened that she should so conduct with it as to defeat the rights of the plaintiffs.

We are, therefore, of opinion, that the prayer of the bill ought to be granted.

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## VAN DUYNE v. VREELAND.

(New Jersey Court of Chancery, 1858, 12 N. J. Eq. 142.)

THE CHANCELLOR. The foundation of this suit is a parol agreement, which is alleged to have been made by and between the defendant, John H. Vreeland, and Nicholas Vanduyne, since deceased, the father of the complainant. . . .

The agreement stated in the bill, and the circumstances under which it was made, are as follows: that it was made about thirty-three years prior to the filing of the bill; that the complainant's mother was the sister of the former wife of the defendant Vreeland; that the said Vreeland and his said wife had no children; that as soon as the complainant was born, Vreeland and his wife requested the complainant's father and mother to let them take the complainant, and permit them to adopt and keep him as their son; and as an inducement for them to do so, they promised his parents to treat the complainant as their own son, and that all the property they had should be given to the complainant, so that it should belong to him at the death of Vreeland and his wife. . . .

Having reached the conclusion that the agreement has been proved; that by reason of its part performance it is not within the statute of frauds; that the defendant, Vreeland, has offered no satisfactory reason why it is not obligatory upon him to fulfill it; and that the conveyance to Brickell is a fraud upon the agreement, the most difficult question remains—to what relief, if any, is the complainant entitled?

The bill is not for specific performance. There can be no such thing as a specific performance in the case. The complainant is not *now* entitled to the enjoyment of the property, nor is it possible to ascertain to what part he will be entitled. He, by the agreement, is only entitled to such part of it as the defendant Vreeland may leave at his death. He may exhaust it all during his lifetime. But the

complainant does not ask the court to give him the property. All he asks is that the court may protect him against the consequences of a fraud upon his rights, which will follow from the acts of the defendant, unless the court interferes for his protection. He alleges that he had an agreement with Vreeland respecting this property, and that Vreeland and Brickell have made a disposition of the property between them to defraud him of his rights under that agreement. He does not ask for any redress for that wrong, but that the court will protect him against future probable injury to his rights, which may justly be anticipated from the fraud the defendants have already committed. If Vreeland was dead, the complainant could now ask the court to declare the conveyance to Brickell a fraud, and to compel him to convey the property upon such terms as would be equitable. This, I think, properly comes under the denomination of bills quia timet. If this court does not interfere now for the protection of the complainant, and secure this property at the death of Vreeland, it may have passed into the hands of a bona fide purchaser, and the complainant then be remediless. A bill quia timet is to accomplish the ends of precautionary justice. The party seeks the aid of a court of equity *because he fears* some future probable injury to his rights or interests. They are applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The relief granted must depend upon circumstances. 2 Story's Eq. Jur., sec. 826. "In regard to equitable property, the jurisdiction is equally applicable to cases where there is a present right of enjoyment, and to cases where the right of enjoyment is future or contingent. The object of the bill, in all such cases, is to secure the preservation of the property to its appropriate uses and ends; and whenever there is danger of its being converted to other purposes, or diminished, or lost by gross negligence, the interference of a court of equity becomes indispensable." Ib., sec. 827. . . .

I have, after much reflection, determined to direct a decree to this effect—that the conveyance from Vreeland to Brickell be declared a fraud upon the agreement existing between the complainant and Vreeland; that Brickell be decreed to hold the land subject to that agreement, and upon the following terms; that at the death of Vreeland an account shall be taken, in which allowance shall be made to Brickell for the value of such permanent improvements as he may have

put upon the lands, and for his costs, expenses, and trouble for the support of Vreeland and his wife and of the two colored servants up to the time of Vreeland's death, under the bond of the eighth of November, 1854; that Brickell shall then account for the rents and profits of the land; and that upon the payment, by the complainant to Brickell, of whatever may be found due the latter upon such accounts, Brickell shall convey the land to the complainant, which shall remain subject to the widow's dower, if Mrs. Vreeland should survive her husband.

It appears to me such a decree is equitable, and respects the rights of all parties. Vreeland cannot complain of it. The court does not interfere with his right to dispose of his property as he pleased, except so far as it is a fraud upon his agreement with the complainant. By his conveyance to Brickell, he has deprived himself of all control over the property, except so far as he has retained an interest in it to secure his agreement with Brickell. The decree will not interfere with the enjoyment of it, as far as he has secured it for himself. As far as Brickell is concerned, it is admitted, and there is no doubt of its sufficiency to remunerate him for any expenditures he may incur in the support of all the persons entitled to support up to the time of Vreeland's death. If there is anything over after Vreeland's death, the complainant's claim to it is paramount to that of Brickell. Brickell can lose nothing, as the property is ample for his security. It is right that Mrs. Vreeland's dower in the property should be secured. Upon her marriage with Vreeland, she acquired an inchoate right of dower in the property, notwithstanding the agreement of which the complainant claims the benefit. The agreement with the complainant was subject to such a contingency. At Vreeland's death, the parties may make their settlement upon the terms of the decree. If they cannot, they have their redress in this court. The decree settles their rights.

# CHAPTER IX. BILLS OF INTERPLEADER

## BYERS v. SANSOM-THAYER COMMISSION CO.

(Illinois Appellate Court, 1904, 111 Ill. App. 575.)

Mr. Justice Ball delivered the opinion of the court.

The only personal action in which the right of interpleader existed at common law is detinue. This defect, which might subject the defendant to two judgments for the same cause of action by different plaintiffs, was early seen; and the court of chancery, to prevent the iniquity of such a double judgment, suffered the defendant to come into its jurisdiction, and, upon his naming the contending claimants and surrendering or offering to surrender to the court the thing in contest, the court called such parties before it, and, dismissing the petitioner from further attendance except to pay the money or to deliver the thing claimed, compelled the contestants to try their respective titles before it. The claimants then stood before the court to litigate the questions of right pending between them to the same extent as if the one had brought a bill against the other predicated upon the same matter and for the same purpose. Willson v. Salmon, 45 N. J. Eq. 131. No other question than that of the right to the property in dispute can be litigated in such suit. Sherman v. Partridge, 4 Duer (N. Y.), 646.

At first, this much needed and beneficient remedy was hedged about by strict rules; but, as its equity and usefulness were more clearly recognized, these rules were modified (Supreme, etc., v. Merrick, 163 Mass. 374) until now the test of the right to an interpleader may be stated thus: do the defendants claim the same thing, and will the litigation between the defendants determine the rights of each and all of the defendants as against the complainant and as between themselves as to the thing which is in dispute? In Hoggart v. Cutts, 1 Craig & P. 204, Lord Cottenham said: "The definition of 'interpleader' is not and cannot now be disputed. It is where the plaintiff

says, 'I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.'" . . .

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## POST v. EMMETT.

(Supreme Court of New York, 1899, 40 N. Y. App. Div. 477, 58 N. Y. Supp. 129.)

Rumsey, J. . . . The parties do not differ as to the rule of law applicable to these cases, which is neither unsettled nor doubtful. Before one, situated as the plaintiffs in this action seem to be, is entitled to an order of interpleader between persons making adverse claims to the securities in his hands, it is necessary to establish, not only that adverse claims are made, but that the claims have some reasonable foundation, and that there is reasonable doubt whether the stakeholder would be safe in paying over the money. The mere fact that a claim has been made is not sufficient, but it is necessary to show, in addition to that, some facts or circumstances which would satisfy the court that the claim made has such facts to support it, or such foundation in law under it as would create a reasonable doubt that the holder of the securities would not be safe in paying them over to the person from whom he received them. Bank v. Yandes, 44 Hun, 55; Stevenson v. Insurance Co., 10 App. Div. 233, 41 N. Y. Supp. 964; Schell v. Lowe, 75 Hun, 43, 26 N. Y. Supp. 991. If the party claiming that he is entitled to be protected from an adverse claim comes into court for that protection, he is not entitled to it, unless he establishes that there is some foundation for the claim, or plausibility in it, so that the court can see that he needs protection because he is likely to suffer from the adverse claim if he pays or delivers the security in hostility to it. Mars v. Bank, 64 Hun, 424, 19 N. Y. Supp. 791. It was formerly held that the mere fact of a claim was sufficient to entitle the stakeholder to an interpleader, but that rule has been abandoned, and the rule now seems to be settled as stated above. Judged by what is now the settled rule, the plaintiffs' papers are entirely insufficient to entitle them to the relief which they ask. The

securities received by them from Miss Emmett stood in her name and had been used as collateral security for a note given by her and indorsed by Joseph Richardson. There was nothing upon their face to show that Joseph Richardson had any title or interest whatever in the securities. No evidence is produced that he ever owned them, or that they were bought originally with his money, or that in any way he had any interest whatever in them. Nothing is presented to warrant any doubt on the part of the plaintiffs that the securities belonged to Miss Emmett, except a claim by Butler, as temporary administrator of Joseph Richardson, that he is entitled to them as such administrator, accompanied by an unverified statement of the grounds of his claim. There is not one word of testimony in the case to sustain this claim. and if the claim had been verified, there is nothing to throw any doubt upon the ownership of these securities by Miss Emmett. The plaintiff's claim is therefore entirely unsupported. But, to add to the strength of the defendant's contention, there is produced on her part her own affidavit, explaining the circumstances stated in the unverified claim as to the foundation of the right of Joseph Richardson, and showing clearly that the title to the securities was in her, and that they never belonged to Richardson. In face of these proofs, it is very clear that the claim adverse to the plaintiff's bailor is entirely unfounded, and there is no reason to apprehend that they are in any danger whatever if they pay over the balance in their hands to Miss Emmett, from whom they received the stock, and transfer to her the securities that are left. . . .

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## CRANE v. McDONALD.

(New York Court of Appeals, 1890, 118 N. Y. 648, 23 N. E. 991.)

VANN, J. The material allegations in a bill of interpleader, according to an early decision by the Court of Errors, are: (1) That two or more persons have preferred a claim against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the defendants the thing belongs. (Atkinson v. Manks, 1 Cow. 691, 703.) It was also held in that

case that the complainant should annex to his bill an affidavit that there is no collusion between him and any of the parties and that he should bring the money or thing claimed into court so that he could not be benefited by the delay of payment which might result from the filing of his bill. This method of procedure, in substance, still prevails. (Dorn v. Fox, 61 N. Y. 268.) The plaintiff insists that he has conformed to the practice thus laid down in every particular, while the appellant contends that the complaint is not sufficiently specific with reference to the claims of the defendants, and that no privity is shown between them in relation to their respective demands.

The complaint describes the claim of the defendant McDonald more fully than that of the defendant Goodrich, because the former had sued him and had thus furnished him with a definite description. While the claim of the latter was not clearly nor fully described, enough was set forth to show that it was not a mere pretext, but that it apparently rested upon a reasonable and substantial foundation. If the appellant desired that it should be made more definite and certain, his remedy was by motion under section 546 of the Code of Civil Procedure. (Neftel v. Lightstone, 77 N. Y. 96.) Upon the trial, according to the old chancery practice, as it appeared by the answers of the defendants that each claimed the fund in dispute, no other evidence of that fact was required to entitle the plaintiff to a decree. (Balchan v. Crawford, 1 Sandf. Ch. 380.)

In this case, however, the point was not left to be determined by the pleadings, but evidence was introduced upon the subject and it appeared that at least a fair doubt existed as to the rights of the conflicting claimants. It was not necessary for the plaintiff to decide, at his peril, either close questions of fact or nice questions of law, but it was sufficient if there was a reasonable doubt as to which claimant the debt belonged. When a person, without collusion, is subjected to a double demand to pay an acknowledged debt, it is the object of a bill of interpleader to relieve him of the risk of deciding who is entitled to the money. If the doubt rests upon a question of fact that is at all serious it is obvious that the debtor cannot safely decide it for himself, because it might be decided the other way upon actual trial, while if it rests upon a question of law, as was said in Dorn v. Fox (61 N. Y. 270), "so long as a principle is still under discussion . . . it would seem fair to hold that there was a sufficient doubt and hazard to justify

the protection which is afforded by the beneficent action of interpleader." Although the claim of Mr. Goodrich has since been held untenable by this court (Goodrich v. McDonald, 112 N. Y. 157), it does not follow that no doubt existed when this action was commenced, because the Supreme Court, both at Special and General Term, held that it was valid and attempted to enforce it. This conflict in the decisions of the courts shows that the adverse claims of the defendants involved a difficult and doubtful question and is a conclusive answer to the contention of the appellant that the plaintiff did not need the aid of an action of this character. Was it possible for him to safely decide a point so intricate as to cause those learned in the law to differ so widely?

The law did not place so great a responsibility upon him, but provided him with a remedy to protect himself against the double liability, or, to speak more accurately, against a double vexation on account of one liability. . . .

It required, however, that he should act in good faith, and he insists that he furnished ample evidence upon that question. He offered to pay the money to Mrs. McDonald if she would indemnify him against the claim of Mr. Goodrich, but she refused to do so, and commenced an action to recover the amount involved. A like offer to Mr. Goodrich upon the condition that he should furnish indemnity was declined, and legal proceedings were threatened. Neither defendant would recede from the position thus taken, but both persisted in their respective demands. The plaintiff thereupon paid the money into court pursuant to its order, and then commenced this suit annexing to his complaint, in addition to the usual verification, an affidavit stating that the action was brought in good faith and without collusion with either defendant or with any person "in their behalf." It did not appear that he had attempted to favor the position of either claimant. These facts, with others appearing in the record, furnished adequate support to the conclusion of the trial judge that the plaintiff acted in good faith. . . .

If the actual truth were a defense to a bill of interpleader, the argument of the appellant would be conclusive, but necessarily the plaintiff in such an action has the right to rely upon what is claimed to be true, as otherwise the remedy would be of no value. . . .

## FARGO v. ARTHUR.

(Supreme Court of New York, 1872, 43 How. Prac. 193.)

LEARNED, J. This is an action of interpleader, brought to determine who, among numerous claimants, are entitled to the reward of $5,000 offered by the American M. U. Express Company, after the robbery of Thomas A. Halpine, one of their messengers. The plaintiffs are the company, and they have brought into court the amount aforesaid. The defendants are the persons who severally claim to be entitled to the amount, or to a part of it. . . . .

All of the persons whose names have been mentioned as giving information, or as participating in the arrest, claim the reward or some part of it. Their views are very conflicting. Some claim that the person who first furnished any information which ultimately led to the conviction, is entitled to the whole amount. Some claim that the persons who made the arrest are entitled to the whole, exclusive of all others. Some claim that there should be an equitable distribution of the award among all, including those who furnished information and those who made the arrest. And still another claim is, that those who made the arrest are entitled to $5,000 and those who furnished information to another $5,000. Burwell, Thomas, Leland, Arthur and Potter, however, agree to share among themselves whatever they or any of them shall be entitled to.

1. A case like this is peculiarly proper for an interpleader. The plaintiffs are ready to pay to the persons lawfully entitled. Some of the defendants claim the whole; some claim an equitable distribution. It is evidently a case in which the matter should be adjusted in one suit, and to which the plaintiffs do not know to whom they ought to pay the money. (2 Story Eq. secs. 806 and 29; City Bk. agt. Bangs, 2 Paige, 570). . . .

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## METCALF v. HERVEY.

(High Court of Chancery, 1749, 1 Ves. Sr. 248.)

Demurrer to a bill, which was founded on a rumour, that there was issue by Lady Hammer; which was suggested to be intitled to the estate

in question; and praying that if there was any such person, he might interplead with the defendant, and also praying an injunction to stay proceedings in ejectment by defendant, and to any action for mesne profits.

Two causes for demurrer were assigned. First for the insufficiency of the affidavit annexed to this bill of interpleader, in not saying it was at the plaintiff's own expence, as well as that there was no collusion with the defendant. . . .

LORD CHANCELLOR. . . . As to the first cause of demurrer, there is no such rule of court; the material part of the affidavit being that the plaintiffs should swear they did not collude with any of the defendants: whereas the requiring to swear, it is at their own expence, goes farther: and such an affidavit would require the denying it even in cases where a person may bear the costs of suit without being a maintainer: as a father furnishing the expences of a suit on a bill by his son. . . .

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## COGSWELL v. ARMSTRONG.

(Supreme Court of Illinois, 1875, 77 Ill. 139.)

CRAIG, J. This was a bill of interpleader, filed by Henry D. Cogswell, in the circuit court of McLean county, against William Armstrong, S. M. Murphy, James Walsh, Geo. R. Brooks, and Charles H. Kellogg. . . .

The only other question necessary to be considered, is, whether appellant was entitled to be allowed the judgment of $72 he held against Armstrong, and upon this question there can be no doubt, when the rules of law that control a bill of this character are properly understood. A bill of interpleader is ordinarily exhibited where two or more persons claim the same debt, or duty, or other thing, from the plaintiff by different or separate interests, and he, not knowing to which of the claimants he ought, of right, to render the same debt, duty or other thing, fears that he may suffer injury from their conflicting claims, and therefore prays that they may be compelled to interplead and state their several claims, so that the court may adjudge to whom the same debt, duty or other thing belongs. Story's Equity Pleading, sec. 291.

In Haggart v. Cutts, 1 Craig & Phillips, 204, Lord Cottenham said: "The definition of 'interpleader' is not and can not now be disputed. It is where the plaintiff says, 'I have a fund in my possession, in which I claim no personal interest, and to which you, the defendants, set up conflicting claims; pay me my costs, and I will bring the fund into court, and you shall contest it between yourselves.'"

In this case, one of the defendants did not contest the right to the money. The other defendants appeared and insisted upon the payment of the money to them. The complainant, however, who could only file his bill and have it determined which of the defendants claiming the fund was entitled to it, is urging that a portion of the fund should go to him. We are aware of no authority which would sanction the right of appellant to enter into the contest for a portion of the fund. . . .

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## WELCH v. BOSTON.

(Supreme Court of Massachusetts, 1911, 208 Mass. 326, 94 N. E. 271.)

KNOWLTON, C. J. The plaintiffs, as executors of the will of Quincy A. Shaw, have been taxed by the assessors of the city of Boston for a large amount of personal property belonging to his estate. They contend that, before the time for the assessment of this tax, the property had passed to themselves as trustees, and was therefore not taxable in Boston. If they are right in this contention, they have a perfect remedy by paying the tax and suing the city and collecting it back. It appears that, as trustees under this will, they have also been taxed for portions of this property in the city of Beverly and the towns of Brookline and Milton, where different beneficiaries under the trust reside, and where it is taxable, if it was legally transferred from the executors to the trustees, and notices thereof given to the assessors, in accordance with the requirements of the law. The plaintiffs have brought a bill which is referred to as a bill of interpleader, and have made these four municipalities, and the assessors and the tax collector of each of them, parties, seeking to compel them to come in and interplead, and thus to try the validity of the several assessments made upon the property. The first question is whether the court has jurisdiction of the case.

This is not strictly a bill of interpleader, and, apart from considerations relative to the statutes providing for the assessment and collec-

tion of taxes, to which we shall refer hereafter, it is plain that it cannot be maintained as such. It is not a case to settle the right to certain property which is brought into court. The claim of each of the defendants is entirely independent of that of each of the others. There is no privity between them, or between either of them and the plaintiffs. It is not a case in which the plaintiffs are free from interest in the controversy; for the rate of taxation differs greatly in the different places, and it is for the interest of the plaintiffs, or of those whom they represent, that some of the defendants should prevail rather than that some others of them should prevail. No property is brought into court to be contended for by the different defendants. The plaintiffs ask the court to determine the truth as to certain facts which are in dispute between the parties, and upon the existence of which the legal rights of some of the parties, in the performance of their official duties, depended when they assumed to perform these duties. The suit cannot be maintained as a bill of interpleader. Third National Bank of Boston v. Skillings Lumber Co. 132 Mass. 410. . . .

But these considerations arising from the laws in regard to the raising of money by taxation are conclusive. We have an elaborate statutory system covering this subject, the purpose of which is to assure a prompt collection of revenue for the government, in its different departments and subdivisions. Remedies are provided for those who are compelled to pay taxes illegally assessed, which are direct and adequate. For this reason it has been decided many times, in this Commonwealth, that equity will not interfere to determine the validity of a tax, but will leave the machinery of government to move precisely as it was intended to move by the framers of the laws in regard to the assessment and collection of taxes. Brewer v. Springfield, 97 Mass. 152. Loud v. Charleston, 99 Mass. 208. Hunnewell v. Charlestown, 106 Mass. 350. Norton v. Boston, 119 Mass. 194, 195. The rule has been reaffirmed recently. Webber Lumber Co. v. Shaw, 189 Mass. 366. Greenhood v. MacDonald, 183 Mass. 342. The doctrine was applied to a case identical with the one at bar, in all its material facts. Macy v. Nantucket, 121 Mass. 351. That this case rightly states the law of this Commonwealth has never been questioned. The cases in New York are under a statutory system which is materially different from that of Massachusetts. It is held there that assessors are liable to a suit for damages for assessing a tax against one upon whom they have

no right to make an assessment. Dorn v. Fox, 61 N. Y. 264. Dorn v. Backer, 61 N. Y. 261. Mohawk & Hudson Railroad v. Clute, 4 Paige, 384. Thomson v. Ebbets, Hopk. Ch. 272. On the question before us these decisions are at variance with our own.

The only remaining question is whether we have jurisdiction from the fact that none of the defendants has objected to the jurisdiction. This is a matter affecting the public interest. The considerations which have moved this court to decline to interfere with the collection of a tax assessed by the proper officers have been considerations of public policy, adopted, and impliedly declared, by the Legislature, in the statutes relative to the taxation of property. The assessors of each of the cities and towns have been brought before the court as defendants in this case. Their duties are prescribed, and when they have assessed the taxes and issued their warrant to the collector they have no power to do anything that shall interfere with the collection of the taxes. They cannot consent to proceedings in a court of equity, to determine the validity of the action that they have taken officially under their oaths. They are a board of public officers who act under the authority of the statutes. It is no part of their duty to represent the people in a suit of this kind.

The same is equally true of the collector of taxes. When his warrant is committed to him by the assessors, he is to do that which the law has prescribed for him, namely, he is to collect the taxes, and all of them, so far as possible. He has no more power than a member of the school committee to waive anything, or to consent to anything that shall put in question the validity of the tax before a court of equity. . . .

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## WARINGTON v. WHEATSTONE.

(In Chancery, 1821, Jacob, 202.)

The Lord Chancellor. The injunction on an interpleading bill does not, like the common injunction, leave the plaintiff at law at liberty to demand a plea, and proceed to judgment, but it stays all proceedings. The plaintiff in an interpleading bill admits that he has no defence, and makes an affidavit that he does not collude with either party; the protection that he has is, that he is relieved from their pro-

ceedings against him, whether at law or in equity, as soon as his diligence enables the court to do so. The question here seems to be, whether that protection is to be taken away, because the plaintiff in some other suit may make a motion for payment of the money into court. If a party gives notice of his claim to the money by filing a bill, and it is afterwards paid away pending the suit, I do not know that his not having moved for it to be paid in would be any protection.

It is important certainly to consider these points, for I understand that an opinion is afloat that on an interpleading bill the injunction cannot be moved for till the time for answering it out. I always thought that it was not so, but that the injunction might be moved for at once; indeed there are some cases where the injunction would be quite useless, unless it could be obtained immediately. Some mistake I believe arose in a communication that I had on this point with the Vice-Chancellor through Mr. Crofts. I think I then mentioned to him the case of the plaintiff, not knowing that a bill would be necessary, from not having notice of the demand of one party, till the other had obtained judgment, and was about to take out execution.

Here the question is, whether the plaintiffs can have the same protection in another person's suit that they can have in their own. If you do not let them have the carriage of the cause, and the plaintiff in the other does not move for them to pay the money in, I question whether his not doing so would be an answer to him at the hearing, for the pendency of the suit is notice of his demand. If the plaintiffs in this cause could make this motion in the other cause, it must be supported by an affidavit of there being no collusion, otherwise they could not be allowed the same advantages that they would have upon a bill of interpleader; but I do not remember any instance of such a motion.

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## PRUDENTIAL ASSURANCE CO. v. THOMAS.

(In Chancery, 1867, 3 Ch. App. 74.)

This was a motion in an interpleader suit.

Sir John Rolt, L. J. . . . Then it is said that the order which was made ought not to have been an order to stay the prosecution of the other suit. It is first of all said that the existence of a suit in this

Court by one of the claimants was a sufficient reason why the Court should not have granted the injunction; but I think the case of Warington v. Wheatstone (Jac. 202), is clear upon that point, and is a very distinct authority that there is a reason for coming to this Court by way of interpleader, when one claimant insists that she will hold the company responsible if they pay the adverse claimant. One of the claimants was proceeding in equity to enforce payment, and the other was declaring that she would hold the company responsible if they paid that claimant; and it appears to me that that was a reason why the company should force them to interplead. If Thomas had proceeded at law it would not have been in his power to have made Mrs. Black a party to the litigation; but, having determined to come into a Court of equity, nothing would have been easier for him than to have made her a party. He knew that she was a person claiming; he knew that the only reason the company alleged for not paying was, that she was making an adverse claim, and therefore a bona fide litigation by him ought to have included Mrs. Black as a party to his suit. Certainly the existence of that suit did not stand in the way of the Plaintiffs filing a bill of interpleader.

Then it was said that the order ought not to have stayed the prosecution of that other suit. At first I was disposed to think that the course of the Court generally is to leave every suit in equity to stand or fall upon its own merits, and not in one suit to grant an injunction to stay or restrain proceedings in another; but the case of Warington v. Wheatstone serves to shew that an injunction in an interpleader suit may extend to restrain proceedings in equity as well as at law against the stakeholder, as appears from the decree which is given in Seton on Decrees, (Vol. 2 p. 962, 3d Ed.); and the case of Sieveking v. Behrens (2 My. & Cr. 581), seems to have been to the same effect. I am, therefore, not able to say that the order for the injunction was in any respect wrong, and I think that Thomas, the Plaintiff in the other suit, having chosen to institute that suit, it was right to bring the money into Court in a suit to which Mrs. Black was a party, and to restrain all other proceedings in the matter. I think there is nothing inconsistent with the course of practice to say that the injunction should extend, as the Vice-Chancellor originally extended it, to stay proceedings in equity as well as at law, and therefore that his original order was right.

## THE CREDITS GERUNDEUSE LIMITED v. VAN WEEDE.

(Supreme Court of Judicature, 1884, 12 Q. B. D., 171.)

Pollock, B. This was an application on behalf of Van Weede, who is defendant in an action at the suit of the Credits Gerundeuse, Limited, for leave to serve a copy of an interpleader summons upon one Don Pedro Jordi, a Spanish subject now at Gerona, in Spain. . .

Mr. Justice Mathew sitting at chambers declined to make the order asked for upon the ground that, Jordi being a foreign subject and resident abroad, this Court would have no authority to enforce any order which might be made against him. The matter does not appear to have been fully argued at chambers, nor was the attention of the learned judge called to the authorities.

Had Jordi actually commenced an action in this Court against the defendant, claiming the goods or their value, it would seem clear that the Court ought to make the order asked for upon the ground that Jordi, when seeking to avail himself against the defendant of the jurisdiction of an English Court, must properly be held to be amenable to any order which the Court might think right to make with a view of doing substantial justice between all the parties before it.

It would seem however upon principle that although Jordi is not now before the Court, but only threatens an action against the defendant, it is equally reasonable that he should be served with a copy of the interpleader order. It is one of the first principles of all judicature that, wherever there is a dispute as to the right to property or its value, all the parties interested therein should be before the Court, in order that the matter may if possible be finally settled and complete justice done.

Now in the present case the Court by making the order asked for, does not assert any present jurisdiction over Jordi, or propose to compel him to submit to its process, but merely gives him notice of the proceedings which are being taken; so that if after such notice he should decline to submit to the jurisdiction of the Court, and allow the rights as between the plaintiffs and defendant to be determined in his absence, and hereafter commence an action against the defendant in respect of the identical claim now made by the plaintiffs, he may be

barred from continuing proceedings which would be harassing upon the defendant, who would thereby be twice vexed for the same cause. If Jordi has a good claim, as he asserts, against the defendant, he is not put in a worse position by prosecuting it now instead of waiting till the action by the defendant is determined.

The question now before us does not appear to have arisen often in our Courts. Mr. Barnes, however, cited the case of Stevenson v. Anderson (2 V. & B. 407), as containing the high authority of Lord Eldon in favour of the view we have taken. The defendant, who had ordered goods from J. & J. Goodall, in Scotland, and remitted bills to them in payment, and afterwards was sued in Scotland by a creditor named Dick, who had attached the bills in the hands of the Goodalls, the defendant wrote to the Goodalls desiring to have the bills returned, and also demanded them of the plaintiff to whom they had been sent to procure payment of them. On his refusing to deliver them up, the defendant commenced an action of trover against the plaintiff. The plaintiff then filed his bill, praying that the defendants, the Goodalls and Dick, who were out of the jurisdiction, might interplead as to the bills, and for an injunction. This bill was sustained on demurrer; and, in giving judgment, Lord Eldon fully explained the grounds upon which the jurisdiction of the Court rested, as follows: "It was objected that the Goodalls and the attaching creditor are out of the jurisdiction; and as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities that proposition cannot be maintained, as a person out of the jurisdiction may threaten and bring an action, and, though he should never come within the jurisdiction, there is a familiar mode of concluding him. The plaintiff is bound to bring all persons into the field to contend together. That rests upon him. I have had occasion to consider that with reference to persons, not residing in Scotland, but foreigners; and the opinion I formed upon it without any difficulty or the aid of a precedent, which I could not find, though there is precedent enough of willing defendants, is that the plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction in a reasonable time; if he does not, the consequence is that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction when they think proper to come

within it and sue either at law or in this Court. If the plaintiff can shew that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default and their so abstaining from giving him the opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and injoin that action for ever; not permitting those who refused the plaintiff that justice to commit that injustice against him."

In a modern case, East and West India Dock Co. v. Littledale, (7 Hare, 57), some of the parties whom it was sought to make defendants in an interpleader were Parsee merchants resident at Bombay, and the same objection was raised. The report does not disclose what was said upon the argument or in the judgment upon this point. It is clear, however, that it was brought to the attention of the Court, and also that the Vice Chancellor (Sir James Wigram) allowed the order to go. . . .

Upon this state of the authorities, and for the reasons already given, we think that the present application should be granted. It is only for leave to serve the summons, and it will be open to Jordi to raise any point after he is served. As, however, the question is of some importance as affecting the practice in interpleader, we have thought it right to deal with it fully. Application granted.

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## BYERS v. SANSOM-THAYER COMMISSION CO.

(Illinois Appellate Court, 1904, 111 Ill. App. 575.)

MR. JUSTICE BALL. . . . The rule seems to be (although there are many well considered cases in England and in this country to the contrary, (Wells v. Miner, 25 Fed. R. 538; Crane v. McDonald, 118 N. Y. 654), that the same debt, duty or thing must be severally claimed by the defendants from the plaintiff by virtue of a title dependent upon or derived from a common source.

In the case at bar each of the defendants originally claimed the cattle which appellants sold upon the Chicago market. Now they severally assert the right to the money realized from that sale. The

herd of cattle is the common source of title. Hence each and all of the defendants claim the same thing from appellants by virtue of the same title. The establishment of the title of one class of these defendants will extinguish that of the other class.

The objections set forth in the first, second and third special grounds of demurrer may be reduced to one, namely: that the claims of the other defendants, as stated in the bill, do not show their right to compel the demurring defendants to interplead with them.

The objection is without merit. Appellants cannot be presumed to know all the facts upon which the several defendants claim this money; and they are therefore not required to set forth in detail the alleged title of any of them. A bill of interpleader proceeds upon the ground that the complainant from ignorance of the rights of the several defendants, is unable to ascertain to which of the defendants he is to account. Shaw v. Coster, 8 Paige, 339, 347; Briant v. Reed, 14 N. J. Eq. 271, 277; State Ins. Co. v. Gennett, 2 Tenn. Ch. 82. Appellants were not called upon to decide disputed questions of fact, nor to resolve doubtful points of law, under the penalty of dismissal of their bill. Having stated their danger, in this, that opposing claims are made as to the money, their indifference as between the several defendants, and their willingness to pay the money to the one entitled thereto, they have done all that is required of them. Supreme Lodge v. Roddatz, 57 Ill. App. 119; Morrell v. Manhattan, 183 Ill. 268.

The primary object of such a bill is to protect the stakeholders from a double vexation in respect of one fund, duty or thing. For this liability the law furnishes no adequate remedy; and hence arises the jurisdiction of a court of equity, without which that court would lack the power to do justice. Newhall v. Kastens, 70 Ill. 159; Crane v. McDonald, 118 N. Y. 654.

At the present stage of this case the objection that the appellants are not indifferent as between the defendants is fully met and overcome by the allegation in the sworn bill that they "do not in any respect collude with either of said defendants touching the matters in controversy in this case; nor have they exhibited this bill of interpleader at the request of defendants, or either of them, but of their own free will, and to avoid being molested, vexed and harassed touching the matters contained therein." The defendants demurred to the bill, thereby admitting the truth of this allegation. Further, the chan-

cery practice requires the complainant to file an affidavit with his bill, stating that there is no collusion between him and any of the parties. If the bill containing the same allegation is verified (as in the case here), the rule is complied with. The court gives credit to the affidavit, and will not permit evidence to be adduced to contradict it. 2 Dan. Chy. Pl. & Pr. 1563, and cases cited in note 5.

In Stevenson v. Anderson, 2 Ves. & Beames, Lord Chancellor Eldon said: "Though I doubt whether there is perfect bona fides on the part of the plaintiff, I find it decided that the court is, in the first instance, concluded by his affidavit that there is no collusion, and will not admit an affidavit to the contrary."

The final objection is that as appellants are the agents of Hardin & Smith, they owe a duty to them which cannot be determined in this proceeding.

The doctrine is well settled that if it appears the complainant is under a personal obligation to one of the defendants in respect to the duty or thing in contest, so that the litigation among the defendants under the bill will not determine that obligation, the bill must be dismissed. This doctrine flows naturally and necessarily from the nature of a bill of interpleader.

In Crawshay v. Thornton, 2 Myl. & C. 1, complainants, who were wharfingers, received a quantity of iron from a third person, with orders to deliver it to Thornton; and they wrote the latter that they held it subject to his orders. Thereafter, Daniloff claimed to own the iron, asserting that the person who delivered it to complainants was his agent, without authority to dispose of it. Complainants filed a bill of interpleader making Thornton and Daniloff defendants. Lord Cottenham held, in effect, that what had taken place between complainants and Thornton amounted to an independent contract which could not be decided under the bill.

"If the plaintiffs have come under any personal obligation independently of the question of property, so that either of the defendants may recover against them at law without establishing a right to the property, it is obvious that no litigation between the defendants can ascertain their respective rights as against the plaintiffs."

Hence, the appeal from the decree of the vice-chancellor sustaining a demurrer to the bill was dismissed.

In Mitchell v. N. W. M. &c. Co., 26 Ill. App. 295, the complainant, before he filed his bill of interpleader, had so answered a garnishee summons that he thereby incurred a legal liability to one of the defendants to which he was bound to respond at all events. Therefore his bill was dismissed.

Appellants are commission merchants, engaged in business at the Union Stock Yards, Chicago. The relation between them and Hardin & Smith, who shipped the cattle, is that of bailor and bailee. No other personal obligation rests upon them except that which grows out of the receipt of and the sale of the cattle.

Lord Cottenham, in Crawshay v. Thornton, supra, held that in case of a simple bailment "there is no personal undertaking and no liability or right of action beyond that which arises from the legal consequences of the bailment."

A commission merchant to whom goods have been consigned for sale, and who claims no interest in the proceeds after deducting his costs and charges, may file a bill of interpleader based upon the adverse claims of the receiver of the consignor's property and of an attaching creditor of such consignor. Pope v. Ames, 20 Oregon, 199.

An agent who receives the money of his principal will hold the same in trust, and will be held to account for the same as trustee; but the debt due from a factor or commission man for the proceeds of goods sold for his principal is not a fiduciary debt. Svanoe v. Jurgens, 144 Ill. 514.

This distinction is noted in Cooper v. De Tastel, 1 Taunt. 177, where it is held that where goods were deposited with a warehouseman, not as warehouseman, but as a private agent, he could not maintain a bill of interpleader.

It seems that the mere fact that a contract relation existed between appellants and Hardin & Smith, by the terms of which the former were bound to pay the proceeds of the sale to the latter, does not necessarily deprive appellants of the right to file a bill of interpleader. Bechtel v. Shaefer, 117 Penn. St. 555.

In many of the text books, and also in some of the cases, it is stated that the bailee cannot file a bill of interpleader against the bailor and a third person claiming title; yet in every case to which we have been referred, or which we have found, wherein that statement is made, it is either dictum, or the facts show a personal obligation upon the

part of the complainant to one or more of the defendants outside of that which arises solely from the legal consequences of the bailment.

In Platte Valley Bank v. Nat'l Bank, 155 Ill. 250, Halsey deposited with the National Live Stock Bank the sum of $5,963.18, to be credited to the Platte Valley Bank, and to be paid to the latter bank upon a draft to be drawn by it. The former bank notified the latter bank of the deposit. Before the Platte Valley Bank had drawn this money an Omaha bank notified the National Live Stock Bank that it claimed the fund as the proceeds of certain cattle owned by Halsey, by him mortgaged to the Omaha bank, and then by him wrongfully converted without its knowledge or consent, and that the Platte Valley Bank had notice of such wrongful conversion. It was held that a bill of interpleader filed by the National Live Stock Bank, making the contesting banks and Halsey defendants, could be maintained. The facts in that case are quite similar to those in the one at bar. But it is not necessary to a decision of this case that we should hold that a commission merchant who has taken upon himself no other obligation than that which arises from the receipt of the goods consigned to him, may file a bill of interpleader when the title to such goods or the title to their proceeds is claimed by a third party. . . .

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## RAUCH v. FT. DEARBORN NAT. BK.

(Supreme Court of Illinois, 1906, 223 Ill. 507, 79 N. E. 273.)

MR. CHIEF JUSTICE SCOTT. . . . The first requisite of a bill of interpleader is, that it must show that the defendants are claiming the same debt, duty or thing from the complainant. (Cogswell v. Armstrong, 77 Ill. 139; Platte Valley Bank v. National Live Stock Bank, 155 id. 250; Morrill v. Manhattan Life Ins. Co. 183 id. 260.) Appellants contend that the bill in this case is fatally defective because it does not show that they are claiming the same debt or duty that is claimed by Rein or the drawee banks. It is therefore necessary to determine what is claimed by the respective defendants to the bill.

Under Rein's contention that the endorsements on the checks were authorized or ratified by Rauch & Co. appellee occupies the position

of debtor towards Rein, (Woodhouse v. Crandall, 197 Ill. 104,) and Rein is claiming a debt from appellee which was created by depositing the checks and receiving credit therefor upon his deposit account. Under appellants' contention that the endorsements were forged, the drawee banks stand in the relation of debtors to appellants, (Munn v. Burch, 25 Ill. 35; Gage Hotel Co. v. Union Nat'l Bank, 171 id. 531;) and appellants are claiming debts from the drawee banks which were created by a demand for the payment of checks drawn by depositors of those banks, payable to the order of appellants. The defendant banks are not claiming any debt from appellee, but a duty to defend the suits brought against them by appellants and a liability on the part of appellee to reimburse the defendant banks for such sums as they may be required to pay in satisfaction of judgments rendered in those suits on account of the eight checks in question.

The bill does not allege that appellants are asserting any claim whatever against appellee for any debt, duty or other thing. So far as appellants are concerned, appellee is a perfect stranger to the transaction through which appellants claim the debts against the drawee banks, and the fact that the drawee banks, relying upon the endorsements of appellee's name on the checks, have paid over to the appellee the money called for by those checks and are preparing to enforce the liability against appellee upon those endorsements in case recovery is had upon the checks in the suits brought against them does not change the nature of the appellant's demand against the drawee banks, nor substitute the liability of appellee for that of the drawee banks upon the debts claimed by appellants. First Nat'l Bank v. Pease, 168 Ill. 40.

It is therefore apparent that appellants are not claiming the same debt, duty or other thing that is claimed by Rein or by the drawee banks, and the bill is in this respect fatally defective as a bill of interpleader.

Appellee urges, however, that the bill can be maintained upon the theory that the appellants have a cause of action against it if the endorsements of the firm name on the checks were forged. Any right of action that appellants may have against appellee arises from the fact, if it be a fact, that they never transferred the title to the checks to any one, and when appellee surrendered the checks to the drawee banks and received the proceeds thereof the transaction was an unlaw-

ful conversion of appellants' property, for which they might maintain an action of trover against the appellee, or might waive the tort and bring suit in assumpsit for money had and received for their use. Talbot v. Bank of Rochester, 1 Hill, (N. Y.) 295; Robinson v. Chemical Nat'l Bank, 86 N. Y. 404.

Manifestly, when one person is claiming a debt arising out of contract and another damages arising out of a tort, both are not claiming the same debt, duty or thing. Thus, in Willard's Equity Jurisprudence, 318, it is said: "Suppose the vendee of goods should be sued by the vendor for the price and by a third person claiming a right paramount to that of the vendor. Here it is obvious that a bill of interpleader will not lie, because one of the claimants merely seeks to enforce a contract and the other claims as for an unlawful conversion. (Slaney v. Sidway, 14 Mees. & Welsb. 800.) . . .

On the same principle, where a party having purchased a rick of hay from an executor de son tort was threatened with a suit from the rightful administrator of the same estate and payment demanded, he was held not to be entitled to maintain a bill of interpleader or to have relief under the Interpleader act. As actual purchaser he was liable on his express contract unless he could defend the action. To the rightful administrator he was liable only in tort for the conversion. Though the property claimed was the same, the duty or obligation was different.—James v. Pritchard, 7 Mees. & Welsb. 216; Glyne v. Duesbury, 11 Sim. 139."

Moreover, the authorities seem to be uniform upon the proposition that a bill of interpleader cannot be sustained where the complainant is obliged to admit, or where it appears, that as to either of the defendants he is a tort feasor. 11 Ency. of Pl. & Pr. 457; Willard's Eq. Jur. 320; Beach on Modern Eq. Pr. sec. 143; 2 Daniell's Ch. Pr. (5th ed.) 1566; Maclennan on Interpleader, 60; Conley v. Insurance Co. 67 Ala. 472; Mount Holly, etc. Co. v. Feree, 17 N. J. Eq. 117.

As hereinbefore stated, appellants are not making any claim against appellee. They have instituted suits against the drawee banks upon the checks, and seek to recover from them in actions ex contractu on the theory that the endorsements of their firm name upon the checks were forged or unauthorized. We are of the opinion that where a person has a cause of action against one upon a contract and against another for a tort, and the satisfaction of a judgment

against either upon the cause of action against him would be a bar to the enforcement of the cause of action against the other, a court of equity is without power to compel such person to relinquish his claim and abandon his suit against the one liable upon the contract and require him to proceed against the one liable for the tort. This, in effect, is what appellee is attempting to accomplish in this suit. It is asking that appellants may be enjoined from prosecuting their suits against the drawee banks upon contracts and be compelled to litigate their right to recover against appellee for a tort.

In our judgment a bill of interpleader, for the reasons stated, cannot be maintained against appellants under the facts disclosed by the bill, and the demurrer should therefore have been sustained. . . .

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## COOK v. EARL OF ROSSLYN.

(In Chancery, 1859, 1 Giff. 167.)

The Vice Chancellor: By the general rule of the Court, which is so convenient that it should be strictly observed, a tenant is not entitled to maintain a bill of interpleader against his landlord.

Lord Rosslyn, in the case of Dungey v. Angrove (2 Ves. 303-4), laid down the rule in these terms: "The only case in which a tenant can come into this court by an interpleader bill is, where the lessor has done some act himself that embarrasses the tenant, which is the case of a mortgage;" that means, by a mortgage granted after the lease. And at page 307, he says, "While the tenant is bound by contract to pay to Angove" (that is, the lessor), "Hernal (the mortgagee) may eject him, and may bring an action for use and occupation, but he never can for the rent. This is a different demand. The parties interpleading must each in supposition have a right to the same demand." Such is the rule as stated by Lord Rosslyn.

Lord Eldon, in deciding the case of Cowtan v. Williams (9 Ves. jun. 107), had to consider the right of a tenant to file a bill of interpleader against his landlord. The Attorney-General, for the defendant, insisted that the tenant could not file a bill of interpleader against his landlord. Mr. Romilly, for the plaintiff, distinguished this as a case

of exception, where the question arises from the act of the landlord, subsequent to the lease. Lord Eldon concurred in that distinction, and mentioned "Lord Thomond's case, in which a bill of interpleader was filed by tenants against their landlord and persons claiming annuities granted subsequently to the lease; and the bill was supported by Sir Thomas Sewell, the tenant being by the act of the lessor entangled in a question which he could never settle."

In the present case, the legal estate is in mortgagees, who concurred in the demise executed by Mr. Walrond, in exercise of a power. The title of the plaintiff is derived under the mortgagees and under Mr. Walrond, but with a covenant upon the part of the plaintiff to pay the rent to Mr. Walrond, unless it shall be demanded by the mortgagees. It is said, however, that notwithstanding this stipulation, Lord Rosslyn was a trustee; that the plaintiff's having notice of Lord Rosslyn's title, whether it be a mere equitable title or not, yet, having notice of it when he is applied to by Lord Rosslyn as well as by Mr. Walrond to pay his rent, he is entitled to file a bill of interpleader, and to call upon this Court to determine which of these two defendants are entitled.

But the rule is plain, that no tenant has a right to file a bill of interpleader in any such case. The principle of the rule seems to be, that if one party by a deliberate covenant with another engage to pay a sum of money, and that other person has not by any dealing of his own entangled his right to recover that money so secured, it is not competent to the covenantor, on the ground that a claim is made by some person asserting a paramount title, to file a bill of interpleader in this court. Here, knowing the state of the title, the tenant chose to take possession from those who had the legal estate by an arrangement between the trustees and Mr. Walrond, who is the donee of the power, that the rent should be paid under his covenant to Mr. Walrond, until the other parties, of whom Lord Rosslyn was not one, should think fit to give any other direction. . . .

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## LUND v. SEAMEN'S BANK FOR SAVINGS.

(Supreme Court of New York, 1862, 37 Barb. 129.)

The plaintiff alleged in the complaint that the defendant was and is a corporation duly created under the laws of the state of New

York. That on or about the seventeenth day of March, 1860, Anders Larsson deposited with the defendant the sum of twenty-two hundred dollars, which sum the defendant promised and agreed to repay to said Larsson personally, or on his order in writing, and upon the production of the book delivered by the defendant to said Larsson at the time such deposit was made, numbered 81,342, and in which the amount of such deposit was entered to the credit of said Larsson. . . .

By the Court, LEONARD, J. . . . The demurrer to the second defense presents an entirely different question. The plaintiff is the assignee of a depositor in the defendant's bank. The defendant alleges that the deposit is the proceeds of sundry securities belonging to Pehr Erik Larsson and others, which the depositor obtained and fraudulently converted into money, and that Pehr Erik Larsson &c. have notified the defendant of these facts, and that they claim the deposit as their property.

It must be conceded on authority, as insisted by the defendant, that the claim of the depositor is a chose in action and not a bailment. (Chapman v. White, 2 Seld. 412, 417. Downes v. The Phoenix Bank, 6 Hill, 279.) The rule which forbids a bailee to deny the title of his bailor is not applicable. No principle of law can however be found which permits a debtor for goods sold, or for money lent or deposited, to set up, as a defense against the claim of his creditor, that his title to the goods sold, or money lent or deposited, is defective or wrongful. That question is of no concern to the purchaser or borrower, unless the third party who claims to have been despoiled of his goods or money will proceed, by process of law to enforce his rights. It can never be permitted that a debtor may volunteer, by plea or answer, the protection of the claims of those with whom he has had no dealings, to defeat his liability for the performance of his contracts.

The law forbids the defendant to interplead, because these third parties are not in privity with the depositor, but were claiming by a hostile and superior title. Fletcher v. Troy Saving Bank, 14 How. Pr. R. 383; Shaw v. Coster, 8 Paige, 343; Marvin v. Elwood, 11 id. 365.)

It would be a mere evasion to permit the defendant to interpose such rights of third parties as a defence, which they are prohibited from alleging as grounds for an interpleader. The pretended claimants

have shown no wish to enforce their claims against the depositor, if any they have. . . .

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## WELLS FARGO & CO. v. MINER.

(United States Circuit Court, 1885, 25 Fed. 533.)

SAWYER, J. This is an application for a preliminary injunction, in a suit on the equity side of the court, brought by the banking-house of Wells, Fargo & Co. against Richard S. Miner, Frank Silva, and the Southern Development Company of Nevada, to compel them to interplead with one another respecting a certain certificate of deposit, for $7,500, which was issued by complainant to defendant Silva. From the papers used on the hearing, it appears that Silva sold a mining claim to the Southern Development Company for an agreed price of $10,000, and received in payment a check for that amount on the Bank of California. Silva deposited the check with the banking house of Wells, Fargo & Co., who thereupon paid him $2,500 in coin, and issued to him a certificate of deposit for $7,500, "payable to Frank Silva, or order, on return of this certificate properly indorsed." By mesne assignments, before maturity, the certificate came into the possession of the defendant Miner, who now claims to be the owner and holder thereof; but he is alleged by the Southern Development Company not to be a holder in good faith. The Southern Development Company claims that in the sale of the mine Silva made certain false and fraudulent representations as to its character and value, upon which it relied, and by reason thereof it is entitled to rescind the sale, and recover back everything of value which it paid to Silva. Accordingly, before any presentation of said certificate for payment, the Southern Development Company notified Wells, Fargo & Co. that the check on the Bank of California had been obtained by Silva by means of fraud, misrepresentation, and deceit, and that it claimed the certificate in question, and warned them not to pay it to Silva. The Southern Development Company then caused Silva to be arrested and prosecuted on the criminal charge of obtaining money under false pretenses; but the jury disagreed on the trial, and thereupon the district attorney dismissed the information, and the prisoner

was discharged. The Southern Development Company then brought a civil action against Silva, which is now pending in this court, to recover $15,000 damages, alleged to have been suffered by reason of the fraudulent misrepresentations aforesaid, of which suit it notified complainant. It also brought suit against Wells, Fargo & Co., in which neither Silva nor Miner was made a party, to enjoin the payment of the certificate until the determination of the aforesaid action against Silva for $15,000 damages. In this suit, Wells, Fargo & Co. suffered a default, and judgment was rendered against them according to the prayer of the complainant. At this point, Miner presented the certificate to Wells, Fargo & Co. for payment, which was refused on the ground that they had been enjoined, and thereupon Miner instituted an action at law on the certificate against Wells, Fargo & Co., in this court. They appeared in that action, and made a motion, under section 386 of the Code of Civil Procedure of California, that the Southern Development Company be substituted in their place and stead as defendant. This motion was argued elaborately, and denied by the district judge of Nevada, holding the circuit court, on the ground that an equitable cause of suit could not be thus injected into an action at law in the United States courts. Thereupon, Wells, Fargo & Co. instituted the present suit in equity, to compel the defendants to interplead, and they now move for a preliminary injunction, restraining the prosecution of the actions against them respecting the certificate until the determination of the rights of the parties upon an interpleader. They offer to pay the money into court for the benefit of the party who shall be adjudged entitled to it. . . .

This is a motion for an injunction to restrain the prosecution of those suits until the determination of the rights of the parties on the bill for interpleader. The defendants do not deny that the complainants are entitled to the injunction, provided the case is a proper one for a bill of interpleader. They say it is not within the class of cases in which courts of equity, under the chancery practice as it heretofore existed, and under the law of England, have interfered. Conceding defendants to be right on this proposition, it is still, in my judgment, within one of the provisions of the Code of Civil Procedure of the state of California, provided that provision is applicable. Section 386, among other things, provides as follows: "And whenever conflicting claims are or may be made upon a person for, or

relating to personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead, and litigate their several claims among themselves. The order of substitution may be made, and the action of interpleader may be maintained, and the applicant, or plaintiff, be discharged from liability to all or any of the conflicting claimants, *although their titles or claims have not a common origin, or are not identical, but are adverse to and independent of one another.*"

The contention here is that these claims have not a common origin, are not identical, that there is an independent claim, and therefore that they are not within the original chancery jurisdiction. If this clause be applicable, and can be acted upon in this court, it abolishes the distinction resting upon these elements. It is insisted, on the part of the defendant here, that the statute cited is not applicable to the United States courts of equity, as the Code of Procedure does not apply on the equity side of the courts. If it were merely a provision regulating procedure, undoubtedly it would be so ; but I think it is more than that. It gives a right to a party in equity. It enlarges his equitable rights; it enlarges the scope of his remedy. It is not a question of enlarging the jurisdiction of the court; it gives a new remedy,—a new right in the form of a remedy. . . .

The statute gives a new right, and if this case does not come within the rule before established by courts of chancery in regard to the points made, I think, under the statute, the remedy is so enlarged as to cover the case; and, as it now stands, the right can be enforced in a court of equity of the United States. The statute gives a new right,—an enlargement of the scope of the remedy; and, it being a case peculiarly of equitable cognizance, it can be enforced on the equity side of the court. . . .

The defendants are liable on that certificate either to the development company or to Miner. They are not liable to both. They do not know which. That is the very thing to be ascertained. The doctrine relied on to deny an interpleader is that announced in Crawshay v. Thornton, 2 Mylne & C. 1, an English case, decided before the present system of practice in England went into effect. It is very doubtful in my mind whether that doctrine would be sustained at this time even in England. The observations of a number of English

judges made subsequently to the decision of that case, and to the change of the law by statute, indicate that they repudiate the doctrine there announced, and regard the grounds on which the distinction is rested as being very narrow. The act of 1860, in England, like the provisions of the California Code of Procedure which I have just read, has abolished the distinction taken in that case. The provision is similar to our statute. I presume our statute was adopted from the English act of 1860. I should be very much disposed to hold the case to be a proper one for interpleader, even if it stood on the ordinary principles of equity jurisprudence alone, without the aid of this act enlarging the equitable rights of parties in such cases. At all events, I am satisfied that by this act a new right was created, broad enough to reach the case, which can be enforced in this court.

I am satisfied, therefore, that it is a proper case for a bill of interpleader, and that the injunction should be granted. The motion is granted, on giving security in the sum of $10,000.

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## QUINN v. PATTON.

(Supreme Court of North Carolina, 1841, 37 N. C. (2 Ired.) 48.)

RUFFIN, C. J. . . . As to the principal point, the case falls directly within the decision made a year ago in the suit of the present plaintiff against Green and others, 1 Ired. Eq. Rep., 229. The difficulties of the plaintiff arise merely on his official duty as sheriff and on the legal priorities between the several defendants. Questions of that kind are more conveniently raised and decided at law than in this Court. If every adverse pretention to preference in the application of an insolvent's property among his creditors, claiming by executions or attachments, would authorize the sheriff to call upon the creditors to interplead, a judgment would seldom be satisfied but at the end of a suit in equity. It would change the whole jurisdiction, and the courts of law would in but few cases be able to compel the sheriff to do his duty upon the process issued to him. . . .

## QUINN v. GREEN.

(Supreme Court of North Carolina, 1840, 1 Ired. 229.)

RUFFIN, CHIEF JUSTICE. The plaintiff, being sheriff of Lincoln county, received a writ of fieri facias for $2,498.23, with interest and costs, recovered by the defendant Green against the defendant Johnson, as administrator of Timothy Chandler, deceased. The plaintiff placed the execution in the hands of one Maury, one of his deputies, who seized under it two slaves, which were found in the possession of the defendant Morris; and also six other slaves, and some cattle and household furniture, which were found in possession of the defendant Elizabeth Chandler. The seizure was made by the direction of the creditor Green, who pointed out the slaves and other articles to the deputy sheriff, as property belonging to the estate of Timothy Chandler, derived from Elizabeth Chandler by their intermarriage and his subsequent possession. Morris, alleging the two slaves, that were taken out of his possession, to belong to him under an appointment by Elizabeth Chandler under a power in the will of one Arthur Graham, a former husband of the said Elizabeth, instituted an action of detinue for those slaves against Maury and Green. James Graham, as administrator of one William Graham, deceased, (who was a son of the said Arthur Graham, deceased,) also claimed the other six slaves, under a provision in the will of the father, Arthur; and brought an action of detinue for them against the same persons. A third action, namely, trespass, was brought against the same parties, Maury and Green, by Elizabeth Chandler, who claimed property in part of the slaves and other articles and the right of possession of the whole, and denied that any part was of the estate of her last husband, Timothy Chandler. The deputy sheriff delivered all the effects seized to his principal, the present plaintiff; and he was required by the creditor, Green, to proceed to a sale, and also by Johnson, the administrator of Timothy Chandler, who insisted that the slaves and other things did belong to the estate of his intestate. The sheriff then filed this bill, as a bill of interpleader, against Green, Johnson, administrator of T. Chandler, and against the plaintiffs in the three actions at law, that

is to say, Morris, James Graham, administrator of William Graham, and Elizabeth Chandler; in which he acknowledges the possession in himself of all the property seized by his deputy, and submits to deliver to either or any of the defendants, or otherwise to dispose of it as of right he ought; and, in the meanwhile, prays for an injunction against further proceedings in the suits already brought at law, and also to restrain the creditor, Green, from taking any steps at law to compel him to sell, or amerce, or otherwise punish him for not selling.

To this bill the defendants Green and Johnson, administrator, demurred; and the other defendants put in answers, setting forth the nature of their respective claims, and submitting to interplead with the other parties. But when the cause came on to be argued on the demurrer, between the plaintiff and the two defendants, who had put it in, the Judge of the Court of Equity was of opinion, that the case was not a fit one for a bill of interpleader, and therefore sustained the demurrer and dismissed the bill against those two parties. From that decree the plaintiff appealed to this Court.

In support of the bill, the counsel for the plaintiff has been unable to adduce the authority of any adjudication. His only reliance is a dictum of Lord Mansfield, in Cooper v. Sheriff of London, 1 Bur. 37; in which he mentions a bill filed in Chancery by the sheriff, in a case of disputed property, as one of the modes in which a sheriff may be relieved from danger or indemnified from loss. That, however, could not be a question in that cause; and, indeed, the doctrine belonged to another jurisdiction, and, therefore, although laid down by an eminent Judge, is not authority. We are saved the necessity of discussing the question on elementary principles, by having a case in equity deciding it in opposition to that opinion of Lord Mansfield. Slingsby v. Boulton, 1 Ves. & Bea. 334, was a bill of interpleader by a sheriff, similar to the present; and, on the motion for an injunction, Lord Eldon enquired for an instance of such a bill by a sheriff, and, none being cited, he declared the sheriff to be concluded from stating a case of interpleader, because in such a bill the plaintiff always admits a title against himself in all the defendants. He said, a person cannot file such a bill who is obliged to state, that as to some of the defendants the plaintiff is a wrong doer.

If, in this case, the property was in the plaintiffs in the actions that have been brought at law, the sheriff was a trespasser in seizing

it, and he did it upon the responsibility of answering for the act as a trespass. Against that risk he should have provided, by taking a bond of indemnity from the execution creditor. He cannot escape from responsibility by turning over the owners of the property on the creditor. On the other hand, if the property was really subject to the debt, it was properly seized, and the creditor is entitled to have it sold, notwithstanding unfounded actions or claims by third persons. The sheriff having thus made himself liable to one or other of the parties, by misfeasance or nonfeasance, is not a mere stake-holder, but his interest is directly involved in any decision that can be made on the claims of the other parties.

The decree must therefore stand affirmed and with costs in both Courts.

PER CURIAM. Decree accordingly.

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## GURLEY v. GRUENSTEIN.

(Supreme Court of New York, 1904, 44 N. Y. Misc., 270, 89 N. Y. Supp. 886.)

Action of interpleader by the city of New York against James A. Cody and others. Prayer of plaintiff to be allowed to pay money into court, and the defendant interplead among themselves for the same. Judgment for plaintiff, with costs.

GAYNOR, J. The essential facts are these: The plaintiff owed the defendants Cody Brothers $9,962.53. They assigned the debt to George Fruh, and he assigned it to the defendant Cahen. They afterward also assigned it to Teresa Cody, and she assigned it to the defendant Elizabeth Cody.

After notice of these assignments had been filed with the comptroller of the plaintiff, the defendants Fleer and others, as judgment creditors of Cody Brothers, brought suits against them and this plaintiff (the city of New York) and the said Teresa and Elizabeth Cody to set aside the said assignment to the said Teresa Cody, and to reach the fund and have it applied on their judgments; and they prevailed in their suits.

Instead of paying over the money under the said judgments, the city now brings this interpleader suit, making the said Cahen a defendant.

as she claims the fund under the said prior assignment to Fruh. Cahen was not a defendant in the said judgment creditor suits, nor did the city in its answer therein set up her claim. It answered by a general denial only.

As the said judgment creditors knew of the assignment under which Cahen claimed the fund (they produced it and put it in evidence on the trial of their suits), but nevertheless omitted to make Cahen a defendant, their claim now that the city should be defeated here for laches in not pleading the claim of Cahen in the said suits is untenable. They were in no way misled by the city, and hence there is no foundation for their claim of laches against the city. The neglect of Cahen not being a party was primarily theirs. If the city alone had knowledge of the Cahen claim, or if it was under a duty to cause it to be litigated in the said suits and the plaintiffs therein were unable to cause it to be so litigated, the case here would be different. Baker v. Brown, 64 Hun, 627, 19 N. Y. Supp. 258.

Judgment for the plaintiff without costs.

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## KOPPINGER v. O'DONNELL.

(Supreme Court of Rhode Island, 1889, 16 R. I. 417.)

Bill in equity in the nature of interpleader, and for an account and to redeem. On demurrer to the bill.

January 26, 1889. Durfee, C. J. The case set forth in the bill is as follows: The complainant, being seized on March 22, A. D. 1876, of a lot of land in Cranston, mortgaged it to Willam Hartly to secure a note for $300, given by her husband to said Hartly. June 26, 1878, Hartly sold the mortgage and note to the defendant, Hugh O'Donnell, for a valuable consideration paid by said Hugh, but transferred the mortgage to the defendant, Catherine O'Donnell, wife of said Hugh. On December 7, 1876, the complainant mortgaged said lot to secure a note for $200 given by her husband to said Hugh for money lent to him by said Hugh, but the mortgage was made to said Catherine. The complainant always understood that her liability was to Hugh, and paid the interest accruing on the notes to him, and Catherine never demanded the interest thereon until within a year. The bill avers

on information and belief that the mortgages and notes were delivered to Hugh, and have always been held by him as his own; but Catherine now claims to be the legal owner and to be entitled to payment, and has advertised the mortgaged lot for sale under the power contained in the second mortgage. The complainant avers that she is ready to pay the notes and mortgages, but Catherine not having them cannot surrender them when paid, and that Hugh who has them demands payment to himself. The prayer is, that an account may be taken to ascertain the amount due on the notes, and that the complainant may be permitted to pay the amount when ascertained into court; that the respondents may thereupon be decreed to interplead, and to cancel said notes and mortgages, and surrender them to the complainant; and for an injunction meanwhile staying sale under the mortgages, or either of them, and for general relief. Catherine has demurred, and the case is before us on her demurrer.

The defendant, Catherine, contends in support of the demurrer, that the bill does not make a case for interpleader, because, if the allegations of the bill are true, the complainant can exonerate herself from liability by paying the notes to Hugh, since the notes, if the allegations are true, clearly belong to him. Doubtless it is incumbent on the complainant in a strict bill of interpleader to show by the bill not only that there are conflicting claims, but also that it is doubtful which of them is right. It is not clear that the bill here does not answer this requirement. It shows that the two defendants both claim to be entitled to payment, and that, while the husband paid the money for the notes and mortgages, the mortgages were taken in the name of the wife, which affords a presumption that they were intended as gifts to her. The fact that the husband has kept them in his possession, and has collected the interest on the notes, is not necessarily inconsistent with such an intent, he being her husband. The bill, however, is not a strict bill of interpleader, for in such a bill the complainant only asks for liberty to pay the money to whichever party is entitled to it, and thereafter be protected against the claims of both; whereas the complainant here seeks relief for herself as well, and prays for an ad interim injunction, and that an account may be taken to ascertain the amount due on the mortgages, and upon payment thereof to have the mortgages cancelled and the mortgages and mortgage notes surrendered to her. Such a bill is denominated a bill in

the nature of a bill of interpleader, and has been held to be the proper remedy where, as here, the complainant is a mortgagor seeking to redeem, and there are conflicting claims to the mortgage money. Bedell v. Hoffman, 2 Paige, 199; 2 Story Eq. Juris, sec. 824. We think the first ground of demurrer is untenable. . . .

We do not think that an affidavit negativing collusion was necessary inasmuch as, the complainant seeking affirmative relief, the bill is not strictly a bill of interpleader. 2 Daniell, Chan. Plead. & Practice, 1563; Vyvyan v. Vyvyan, 30 Beav. 65, 70. Demurrer overruled.

# CHAPTER X. BILLS OF PEACE

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## CADIGAN v. BROWN.

(Supreme Court of Massachusetts, 1876, 120 Mass. 493.)

Morton, J. This is a bill in equity alleging that each of the plaintiffs is the owner of a lot of land abutting on a passageway five feet wide, and, as appurtenant thereto, has a right of way over said passageway in common with others; that the defendants have commenced to build a house at one end of the passageway, so as to narrow the width of the entrance to about four feet, and have raised the grade and filled up a part of the passageway so as to injure the access to the lots of the plaintiffs. The prayer is that the defendants be restrained from building the house, that the said obstructions may be removed, and for general relief. The defendants demur, upon the grounds that the plaintiffs are improperly joined, and that they do not state a case which entitles them to relief in equity, having a plain, adequate and complete remedy at law. . . .

2. The other ground of demurrer is that the plaintiffs are improperly joined. The bill shows that each of the plaintiffs owns a lot abutting on the passageway, by a separate and independent title. They derive their titles from different grantors. Undoubtedly, in a suit at law for the nuisance, they could not properly join. But the rule in equity as to the joinder of parties is more elastic. Generally, when several persons have a common interest in the subject matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs. Thus in Parker v. Nightingale, 6 Allen 341, the plaintiffs, being several owners of lots in Hayward Place, each lot being held subject to the restriction that no buildings should be erected thereon except for dwelling-houses, joined in a suit to restrain the defendants from violating the restriction. So in Ballou v. Hopkinton, 4 Gray, 324, several owners of mills upon a

stream joined as plaintiffs in a bill in equity to restrain the defendant from diverting and wasting the water of a reservoir, and to equalize the flow of water in the stream. Indeed, in the latter case the court assigns, as one of the reasons for holding jurisdiction in equity, that at law each owner must bring a separate action to obtain a remedy for his particular injury, and thus the remedy in equity prevents a multiplicity of suits.

In the case at bar, the plaintiffs, though they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendants, and seek the same remedy against them. There is no danger of confusion in the trial, or of injustice to the defendants, from the joinder of the plaintiffs; but the rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented. We are therefore of opinion that this ground of demurrer cannot be sustained. . . .

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## POWELL AND OTHERS v. THE EARL OF POWIS AND OTHERS.

(In the Exchequer, 1826, 1 Y. & J., 159.)

The bill stated, that the plaintiffs were seized in fee of several ancient freehold messuages or tenements, with the appurtenances, situate within, and holden of, the honor of lordship of Clun, in the county of Salop; and then were, and for several years had been, in the occupation of such messuages or tenements; and that they, and those whose estate they respectively had, as such tenants as aforesaid, had from time whereof, &c. had, and of right ought to have, common of pasture for all their commonable cattle levant and couchant, common of turbary, and also common of estovers, in, upon, and throughout a certain forest or waste, parcel of the said honor or lordship Clun, called the forest of Clun; that the several other tenants of the honor or lordship were entitled to the same rights. That the Earl of Powis was, and had been for many years, seised of the honor or lordship, and had lately taken upon himself to inclose, or to permit to be inclosed, certain large portions or tracts of the forest, to the detriment of the plaintiffs and the other persons entitled to commonable

rights; and that the Earl of Powis had granted the parts so inclosed to the other defendants, except the defendant Edye, who were in possession of them. That the right of the several tenants of the honor or lordship to common of pasture without stint, and to common of estovers upon the said forest or waste, was established by a decree of this Court, Hil. T. 24 Eliz. her said Majesty being then seised in right of the Crown of the said honor or lordship. That the plaintiffs, a short time before the filing of the bill, had broken down parts of the fences of the parts so inclosed, for the purpose of exercising their commonable rights. The bill charged, that the several defendants, except the Earl of Powis, had, at the instigation of the Earl, or with his concurrence, and on some understanding that he would defray the expense, commenced actions of trespass against the plaintiffs. The bill also charged, that the defendant Edye was steward of the lordship, and, as such steward, had in his custody the books and muniments relating to the customs of the lordship and the rights of the tenants, but that he colluded with the other defendants and refused to produce them. The bill further charged that Earl Powis and Edye had divers books, writings, &c. from which the facts stated in the bill would appear. The bill prayed, that the rights of common of the plaintiffs and the other freehold tenants might be established; and that the plaintiffs and the other tenants might be quieted in such rights; that the Earl of Powis might be restrained from inclosing any part of the forest, to the prejudice of the plaintiffs and the other tenants, and from obstructing or molesting them in their commonable rights; and for an injunction against the actions of trespass brought by the other defendants.

To this bill the defendants put in a general demurrer. . . .

*Simpkinson, in support of the bill.* . . . The law is clearly laid down in Lord Tenham v. Herbert (2 Atk. 483). There the Lord Chancellor said, "where a man sets up a general exclusive right, and where the persons who controvert it with him are very numerous, and he cannot by one or two actions at law quiet that right, he may come into a Court of Equity first which is called a bill of peace, and the Court will direct an issue to determine the right, as in disputes between lords of manors and their tenants, and between tenants of one manor and another; for in these cases there would be no end of bringing actions of trespass, since such action would determine only the particular right in question between the plaintiff and defendant." . . .

LORD CHIEF BARON. This is a demurrer to a bill, commonly called a Bill of Peace. The cases establish that a bill may be brought by a lord against his tenants, and by tenants against the lord, in respect to rights of common. It is a bill of peace, and to prevent multiplicity of actions.

The dicta and cases shew, that it is no objection to this bill, that the defendants may each have a right to make a separate defence, provided there be only one general question to be settled, which pervades the whole.—It would be against all the cases to allow this demurrer; it would put the bill out of Court. It is not to be inferred from this that the Court will assume jurisdiction to decide any legal question without referring it to law. But until the defendant has answered, the Court cannot know what the question may be. In all probability there may be one general question, as between the lord and all the tenants.

It may certainly be a question whether the lord will approve at all. It may also be a question if he does, whether he has left sufficient common for the commoners. In the case of Weekes v. Slake, issues were directed. We are therefore of opinion that the Court must hear more of the case before it can ascertain what course ought to be taken. This cannot be known until the answer comes in. This pledges the Court to nothing. Demurrer overruled.

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## KEYES v. LITTLE YORK GOLD WASHING & WATER CO.

(Supreme Court of California, 1879, 53 Cal. 724.)

BY THE COURT. The complaint sets forth that the plaintiff is the owner of certain described premises known as bottom land, situate in the valley, upon the banks of Bear River, about ten miles from where that stream debouches into the Sacramento Valley, and midway between that point and the mouth of the river; that the defendants are miners severally engaged in hydraulic mining at points high up on Bear River and its tributaries—the several mining properties of the defendants lying within a radius of seven miles upon the hill-tops adjacent to the river, and being severally wrought and carried on by the respective defendants, and that the several dumps used by the defendants respectively in their mining pursuits are some of them in

the bed of the river, others in the beds of steep ravines and gulches immediately contiguous to and leading into the bed of the river and its tributaries; that the tailings of the several mining claims deposited on these dumps are swept down the river by the force of the current until they reach the lands of the plaintiff below, upon which they are deposited, and which they cover so as to destroy the value of the said lands. The prayer is that an injunction issue enjoining the defendants from depositing the tailings and debris of their several mining claims so that they reach the channels of the river, etc.

The defendants appeared to the action, and filed a demurrer to the complaint upon several grounds—and, among others, upon the ground that there is a misjoinder of parties defendant, in that it did not appear by the complaint that the defendants jointly committed any of the acts complained of, or are acting therein in concert or by collusion with each other, but that, on the contrary, it did appear by the complaint that the defendants had no interest in common in the subject-matter of the suit, but were acting severally and without any joinder or co-operation on the part of the defendants, or any of them. The demurrer was overruled by the Court below, and the propriety of its action in that respect is brought in question by this appeal. . . .

Several cases were cited by counsel for respondent which it was claimed would sustain the joinder of the defendants in this action, but an examination will clearly distinguish them from the present. Mayor of York v. Pilkington, 1 Atk. 282, was a bill of peace to prevent a multiplicity of suits. In a certain sense, all bills of peace are intended to prevent multiplicity of suits, but it is a non sequitur to assert that wherever the result of assumed jurisdiction by a Court of Equity will relieve the plaintiff of the inconvenience of bringing several separate actions at law or suits in equity, the complainant is to be termed a bill of peace. In Mayor v. Pilkington, a bill was *brought to quiet the plaintiffs in a right of fishery* in the River Ouse, of which *they claimed the sole fishery* "of a large tract" against the defendants, who, it was suggested by the bill, *claimed several rights*, either as lords of manors of occupiers of adjacent lands. The main question was whether, in view of the fact that there was no privity between the defendants, the bill could be maintained. Holding the affirmative on this proposition, the Court of Chancery was authorized to retain the cause for other purposes. But the gravamen of the bill was not that

the defendants were several and separate trespassers, (the view upon which the demurrer was sustained at the first argument) but was that the plaintiff had an exclusive right against which defendants were asserting adverse rights. The proceeding was analogous to our action to quiet title. The present case more resembles Dilley v. Doig, 2 Vesey Jr. 486, in which the proprietor of a copyright sought to restrain in the same suit several and independent infringements of his right by different persons. In that case there was no allegation in the bill of a claim of right on the part of the defendants to sell copies of the spurious edition of the book, and, from the nature of the circumstances detailed, there could have been no such allegation. The defendants were alleged to be severally wrong-doers without any combination. The Lord Chancellor said: "The right against the different booksellers is not joint, but perfectly distinct; there is no *privity*." The subject-matter of the bill was a wrong done by each of the booksellers; its object was not to obtain a final determination that the plaintiff had the exclusive right, and that the defendants had no right, (for it was not asserted that they claimed any) but, as in the present case, simply to enjoin wrongs threatened by the defendants severally, and not *jointly*. . . .

We have no doubt that the objections to the complaint above considered could properly be presented by a demurrer on the ground of misjoinder of parties defendant. . . .

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## SOUTHERN STEEL CO. v. HOPKINS.

(Supreme Court of Alabama, 1911, 174 Ala. 465, 57 So. 11.)

Mayfield, J. This is a suit in equity to enjoin the prosecution of 110 separate actions at law. The sole ground of equity jurisdiction upon which the suit is based is to prevent a multiplicity of suits. The separate actions at law were brought by the administrators of 110 unfortunate workmen, who lost their lives by an explosion in a coal mine. Each of these 110 actions was brought, under the employer's liability act, to recover damages for the wrongful death of the respective intestate; was brought against the same defendant, the complainant in this suit; and sought to recover on account of negligence in causing

or allowing the explosion which killed the unfortunate workmen.

The prayer for relief is as follows: "Your orator further prays that your honor will grant unto your orator a preliminary writ of injunction, enjoining and restraining each and all of said parties defendant and their attorneys and successors from all further proceedings in said actions at law, or prosecuting the same in any manner, until the further orders of this court, and that your honor will proceed to hear and determine the question of the liability vel non of said Alabama Steel & Wire Company, in the premises, and, if there should prove to be any such liability, that your honor will further determine the extent thereof, and the manner and mode in which the same shall be prorated or paid."

This appeal, for the second time, brings up for our decision the equity of this bill, a full statement of the facts of which, and a discussion of the law involved, may be found in the reports of the case in 157 Ala. 175, 47 South. 274, 20 L. R. A. (N. S.) 848, 131 Am. St. Rep. 20.

The question of law involved in this suit is this: Has a court of equity jurisdiction to enjoin numerous tort actions, brought by different plaintiffs against the same defendant when there is merely a community of interest in the questions of law and of fact involved, and no common title, no community of interest or of right, in the subject-matter? This question was decided in the affirmative by this court on the former appeal. After the cause was remanded, the complainant amended the bill, and other defendants demurred, and again raised the equity of the bill as last amended. The Chancellor again sustained the demurrer, and from that decree the complaint again appeals to this court.

We regret the necessity of overruling our former decision, and recognize and appreciate the wisdom in the maxim, that "it is as important that the law be certain as that it be right; "yet it is not only our prerogative, but our duty, to overrule a former decision, when we are convinced that it is fundamental wrong, both in theory and in practice."

There is a sharp and distinct conflict in the decisions of the various courts upon this question; but, after a careful examination and review of many of them, and of the text-books upon the subject, we are constrained to recede from the holding on the former appeal, and to fol-

low that line of decisions and those text-books which deny equity jurisdiction to prevent a multiplicity of suits at law, in the absence of a common title, or of some community of right or interest, in the subject-matter among the several parties. To state the proposition differently, we now hold that a community of interest among the several parties in the questions of law and of fact involved is not sufficient to confer jurisdiction upon a court of equity to enjoin the several tort actions at law, though brought against the same defendant, and though each may depend upon the same state of facts. . . .

The evil consequences of maintaining the equity of a bill like this is illustrated clearly by the record in this case. The explosion which killed the 110 workmen in question, and which is the subject of this controversy, occurred February 20, 1905, and because of this proceeding a trial of those 110 damage suits has been delayed for more than six years. Suppose the equity of the bill should be sustained and the parties proceed to trial, and the complainant. fail, then the parties plaintiff, after a delay of many years, will have to be remitted to courts of law to try each of these cases separately. Or, if the complainant succeeded, still there must be 110 trials in the court of chancery, not only as to the liability vel non, as to each of the persons killed, but as to the amount of damages recoverable in each case. If the complainant is liable under the employer's liability act, the amount for which it is liable would be different in each of the 110 cases, depending upon the earning capacity of each decedent, which in its turn, depends upon age, character, habits, etc.

It would be difficult to select a case that would more clearly demonstrate the impracticability of the rule than the one under consideration. Contemplate 110 separate answers, and as many pleas and demurrers in one suit, and the innumerable issues of law and of fact that would be raised thereby, and the defense being conducted by 110 different attorneys, or the parties deprived of the right to have the counsel of their choice—a worse confusion could scarcely be imagined. It could be likened unto the confusion of tongues at the building of the Tower of Babel.

To reach a final decree in this case that would approach justice for all, by a trial of all these issues, and a trial in accordance with our statutes and the rules of law and chancery provided for such cases, would be wholly impracticable, if not impossible. No stronger or more

conclusive argument could be produced to show that the rule announced on the former appeal is wrong than would be an attempted trial of this case upon its merits, in a chancery court, under the prayer of the bill quoted above.

No error appearing in the record, the decree of the chancellor is affirmed.

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## BALLOU & OTHERS v. INHABITANTS OF HOPKINTON.

(Supreme Court of Massachusetts, 1855, 70 Mass. (4 Gray) 324.)

Bill in equity, filed on the 7th of June 1853, to restrain the defendants from letting off and wasting the water in a reservoir on Mill River, situated in the towns of Hopkinton, Milford and Upton. . . .

SHAW, C. J. The only questions in the present case are, whether this court have jurisdiction in equity, to restrain and prohibit the defendants from drawing off water from the plaintiff's reservoir, established for the purpose of supplying the several mills of the plaintiffs, on one and the same stream; and whether it is a fit case for the court to exercise that jurisdiction, rather than leave the plaintiffs to their actions at law, to recover damages for the injuries done them respectively in diminishing the water at their respective mills.

The case comes before us on a general demurrer, and therefore we are to take the facts set forth by the plaintiffs to be true, for the purpose of the present inquiry. The case set forth in the bill is alleged to consist in an injury done by the defendants to the incorporeal hereditaments of the several plaintiffs, in wasting the water which would flow to their mills when it would be useful and beneficial to them, and thereby impairing and diminishing their water power. This is technically a private nuisance, the appropriate remedy for which, at law, would be an action on the case for a disturbance. In such action at law, the remedy would be a verdict for nominal damages for the disturbance of the plaintiff's right; but if actual damage were proved to have been sustained, as the natural consequence of such interruption, then for such sum as would be a compensation therefor up to the time of the verdict, or of the action brought. Being by the

rules of law a nuisance, we have no doubt that it is within the Rev. Sts. c. 81, sec. 8, cl. 8, giving this court jurisdiction in equity, "in all suits concerning waste and nuisance." Boston Water Power Co. v. Boston & Worcester Railroad, 16 Pick. 512.

The other question is, whether, taking the subject of the complaint as the plaintiffs have stated it, the bill shows that the plaintiffs have such a plain, adequate and complete remedy at law, that, according to the precedents and rules of equity, a bill ought not to be sustained, so that the demurrer is well taken to it on that ground.

Upon this question, the court are of opinion that the case shows no such adequate and complete remedy at law as to deprive them of the right of proceeding in equity, and that the demurrer ought not to be sustained. Some of the more prominent reasons for this determination are these:

Although the plaintiffs are several owners of separate and distinct mills, injured by the alleged stoppage, diversion and waste of the water of Mill River, and to recover damages for which each owner must bring his several action at law to obtain a remedy for his particular injury, yet they have a joint and common right in the natural flow of the stream, and in the reservoir by which its power is increased, and a joint interest in the remedy, which equity alone can afford, in maintaining a regular flow of the water of the receiver at suitable and proper times, so as best to subserve the equal rights of them all. The remedy in equity therefore would, by one decree in one suit, prevent a multiplicity of actions. . . .

In regulating the rights of mill owners and all others in the use of a stream, wherein numbers of persons are interested, equity is able, by one decree, to regulate their respective rights, to fix the time and manner in which water may be drawn, and within what limits it shall or shall not be drawn by all parties respectively; and thus it is peculiarly adapted to the relief sought against such alleged nuisance and disturbance, and affords a more complete and adequate remedy than can be afforded by one or many suits at law. Bemis v. Upham, 13 Pick. 169; Bardwell v. Ames, 22 Pick. 333.

Demurrer overruled.

## CITY OF CHICAGO v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, 1906, 222 Ill. 560, 78 N. E. 890.)

CARTWRIGHT, J. . . . The ordinance in this case, [regulating the heating and ventilating of street cars and providing against overcrowding], is within the powers conferred upon the defendant, and it has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance and danger. It is designed to promote the public comfort, safety and health by preventing the overcrowding of cars, and it should be sustained if it is legally possible to do so. To grant an injunction and prevent the prosecution of offenses against the ordinance during the progress of a chancery cause would be to render the municipal authorities helpless in the discharge of their public duties and suspend their legimate functions, contrary to public policy and public interest. At the end of such a suit the court would have no right to determine whether the complainants have been guilty of any infractions of the ordinance or to impose any penalty upon them. If the city should be found to be in the right and the ordinance valid, all that the court could do would be to dismiss the bill and send the parties back to a court of law. In such a case a court of equity would not be warranted in interfering unless it is clearly necessary to the protection of some right recognized only by courts of equitable jurisdiction. . . .

There are cases in which a court of equity will interfere to enjoin the enforcement of an ordinance for the reason that a multiplicity of suits will be prevented thereby, and it is argued that this is such a case. The bill is filed by two complainants, who say that they also ask relief for all others similarly situated. The facts stated, however, do not show that any other persons or corporations are similarly situated. It appears from the bill that the complainants serve practically the whole city of Chicago; that the population served by them is upward of 2,000,000, and that with the exception of twelve other lines operating in outlying districts and not owning down-town terminals, they are the only persons or corporations furnishing street railway transportation. It does not appear that the few other persons or cor-

porations operating in outlying and sparsely settled districts do not furnish a sufficient number of cars, or that there is any necessity in such districts for overcrowding, or that overcrowding cars is permitted, or that any prosecution has been begun or threatened against any other person or corporation, or that any other person or corporation has suffered or will suffer any hardship or makes any complaint whatever of the ordinance or its provisions. The case is not at all like one where a license is required for carrying on an occupation or business, where the inference is that those engaged in the occupation or business will be required to procure the license and pay the fee therefor. The bill sets up conditions respecting these complainants and their business which could have no application to any other party, and it is clear that the controversy is between the two complainants and the defendant. There is nothing in the bill to justify the assertion that they represent a class, and the bill shows that the supposed class is not numerous.

Under the rule that equity will sometimes intervene to prevent a multiplicity of suits, it was held in City of Chicago v. Collins, 175 Ill. 445, that 373 complainants, suing in behalf of themselves and between 200,000 and 300,000 other similarly situated, could maintain a bill to enjoin the enforcement of an ordinance requiring an annual license fee. That was a case where a license was required and a fee exacted from the complainants and all others who made use of means of travel in the city of Chicago. They were all similarly situated. The case of Wilkie v. City of Chicago, 188 Ill. 444, was a similar one. In that case 78 complainants filed a bill in behalf of themselves and 900 or more others from whom the city of Chicago exacted a license fee for pursuing their occupation. Another case where it was held that a court of equity might properly interfere was Spiegler v. City of Chicago, 216 Ill. 114, where complainants, on behalf of themselves and 3000 or 4000 other persons engaged in the same business as themselves, joined in a bill to prevent the enforcement of an ordinance licensing and regulating that business. In all of those cases there was actual application of the ordinance to numerous persons, all of whom were in like situations. In the case of German Alliance Ins. Co. v. VanCleave, 191 Ill. 410, 42 corporations, who were complainants, filed a bill to enjoin the defendant from paying over to the State Treasurer moneys collected from them as a tax. It would have re-

quired at least forty-two suits to accomplish the purpose of the bill and the facts and law in each case would have been exactly the same. It was held that the case was a proper one for the exercise of equitable powers. In the case of North American Ins. Co. v. Yates, 214 Ill. 272, a bill was filed by the insurance superintendent against twenty companies and thirty-three individuals to enjoin them from transacting the business of fire insurance without complying with the law. It was held that in such a case equity might interfere. Plainly, there is no similarity between those cases and this case in which two complainants, operating in different parts of the city and furnishing practically all the street railway service for the city of Chicago, claim the right to maintain a suit in equity to settle the question of the validity of this ordinance for the reason that there are other persons and corporations operating lines of street railway in outlying districts, where perhaps the difficulty is not so much to prevent overcrowding cars as to fill them with passengers. So far as appears from the bill, the only real dispute is between the two complainants and the defendant, and the rights and interests of numerous parties are not involved.

The decree of the circuit court is reversed and the bill dismissed.

Bill dismissed.

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## WILKIE v. CITY OF CHICAGO.

(Supreme Court of Illinois, 1900, 188 Ill. 444, 58 N. E. 1004.)

CARTWRIGHT, J. . . . The first question raised is whether the circuit court had jurisdiction, as a court of equity, over the subject matter of the bill. That jurisdiction was invoked upon the following facts averred in the bill and admitted by the demurrer. The seventy-nine complainants are master plumbers in the city of Chicago, and sue on behalf of themselves and all others similarly situated. There are in the city of Chicago nine hundred or more master plumbers, whose interests in the questions involved are identical and each of whom is liable to prosecution under the provisions which are alleged to be void. The city has made demands upon complainants to take out licenses under said section, and threatened them with arrest if

such licenses are not procured. If they continue to engage in their avocation the city will put its threat into execution and they will be arrested for violation of the ordinance. Each prosecution would involve the same right claimed by the city against each of them. The city would not be civilly liable nor held responsible for damages to complainants. The authorities of the city making arrests are not financially responsible or able to respond in damages. If the master plumbers should pay the license fee and bring suits to recover it, there would be required nine hundred or more suits to recover money illegally obtained. Complainants are threatened with arrest as often as they enter any premises for the purpose of plying their trade, and their business would thereby be practically destroyed.

The mere allegation that an ordinance is illegal will not confer jurisdiction upon a court of equity to restrain its enforcement, but the averments of the bill bring this case within the rule recognized in City of Chicago v. Collins, 175 Ill. 445. The complainants are entitled to join in a suit in equity for the purpose of avoiding a multiplicity of suits and having the controversy settled in one hearing.

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## GERMAN ALLIANCE INSURANCE CO. v. VAN CLEAVE.

(Supreme Court of Illinois, 1901, 191 Ill. 410, 61 N. E. 94.)

Cartwright, J. Appellants, forty-two corporations organized under the laws of other States and countries, doing fire insurance business in this State, filed their bill in this case in the circuit court of Sangamon county against appellees, the insurance superintendent and treasurer of this State, to compel said insurance superintendent to refund a tax of two per cent paid by complainants, under protest, upon unearned and returned premiums for the year 1900, and to enjoin him from paying over to the State Treasurer the tax so collected and from collecting the same in the future, and to enjoin the State Treasurer from receiving said tax. A temporary injunction was granted, which was dissolved upon a motion, treated as a demurrer, for want of equity upon the face of the bill. Complainants elected to abide by their bill, and the court dismissed it at their costs.

The matter in controversy is the proper construction of the act approved April 19, 1899, entitled "An act providing for a tax on

gross premium receipts of insurance companies and associations other than life." (Hurd's Stat. 1899, p. 1042.) That act provides that every insurance company of the class to which complainants belong "shall at the time of making the annual statements as required by law, pay to the insurance superintendent as taxes, two per cent of the gross amount of premiums received by it for business done in this State, including all insurance upon property situated in this State, during the preceding calendar year," and payment of said taxes is made a condition precedent to doing business in this State. There is a proviso for a deduction of so much of the tax as shall be paid to cities and villages having an organized fire department, but the proviso neither increases nor diminishes the tax and does not affect the question involved. The annual statement referred to is a statement required by law of the condition of the company on the last day of the preceding calendar year, showing its capital stock, assets and liabilities, as well as income and expenditures of the preceding year.

The facts alleged in the bill and admitted for the purpose of the motion are as follows: The complainants severally made their annual statements for the year 1899 to the insurance superintendent on or about February 1, 1900, and stated therein the gross amount of premiums received for business done in this State during the year 1899, according to their understanding of the law. In stating such amount they omitted the premiums returned by them to parties insured, upon cancellation of insurance policies, in compliance with the terms of such policies. They paid over to the insurance superintendent as taxes two per cent of the amounts so reported and received their annual certificates of authority to transact business in this State. Each policy of insurance which was cancelled and the unearned premium returned, provided, when issued, that it might be cancelled at any time, at the request of the insured or the option of the insurer, on five days' notice, and the policy should become void and the risk ended on the day of cancellation and the unearned premium be returned. This was the usual course of business of all fire insurance companies in the State. The amount returned was fixed by the policy and was based upon the amount of premium earned up to the time of cancellation. The money returned was the unearned premium for the period after the policy was cancelled and ceased to be in force. The insurance superintendent made demands on complainants to pay a tax of two

per cent of said unearned premiums which had been returned upon the cancellation of policies, and threatened to enforce the penalties provided by the statute and to revoke the authority of the companies to do business in the State unless his demands were complied with. The complainants then paid, under protest, the several amounts so demanded, which are severally stated in the bill, and amount in the aggregate to $15,984.87.

Under the constitution the State can never be made a defendant in any court of law or equity, and it is argued in support of the decree that the bill cannot be maintained because the insurance superintendent is an officer of the State, and therefore the suit is against the State. It is not denied that the State may specify any terms or conditions it pleases on which corporations of other States and foreign countries shall be permitted to transact business in this State. The legislature have fixed one of the conditions in this statute, and the only question involved in the suit is, what is the proper construction of the act? The State is not a defendant by name, and the suit does not relate to property owned by the State or which has ever reached its treasury. There is no attempt to recover money from the State, and the question involved is whether the State has authorized, by law, the insurance superintendent to exact the tax. A suit against him is not different, in any respect, from a suit against any other collector of taxes, and a party is not precluded from questioning the unauthorized act of a tax collector or other officer merely because the money collected will eventually reach the State.

It is next insisted that the decree is right because each of the complainants has an adequate remedy at law, by suit against the insurance superintendent to recover the amount wrongfully collected from it. At least forty-two suits would be necessary to accomplish the purpose and to give to each complainant its legal remedy, and the question involved in each case would be exactly the same. While the demand is separate in each case, the rights of the parties depend upon the same facts. Complete relief may be furnished by a decree determining the single question applicable to all and in which all are interested. The case is a proper one for an application of equitable powers. . . .

## COOK v. CARPENTER (No. 1) LIPPER'S APPEAL.

(Supreme Court of Pennsylvania, 1905, 212 Pa. 165, 61 Atl. 799.)

MITCHELL, C. J. The preliminary question is the jurisdiction in equity. Appellants insist that there is a plain, full and adequate remedy at law, by suits against the several stockholders defendant, where each can defend upon his own case untrammeled by differences of fact in the others. That there is a remedy at law by separate actions against the respondents is undeniable, but is it a full and adequate remedy in the sense that it bars the jurisdiction of equity? . . .

It is earnestly argued by appellants that in all the cases where a bill has been sustained, an accounting was part of the relief sought, and that equitable jurisdiction attached on this ground, while in the present case no accounting is asked, as the bill avers that the whole unpaid subscription will be insufficient to pay the debts. It is true that the necessity for an account is a large and influential element in equitable relief, but we do not find it said in any of the cases, that its presence or absence is the conclusive jurisdictional fact. In the present case the bill sets up facts that avoid the necessity for an accounting and an assessment. But suppose the answer had denied the averments and thus made the necessity of an accounting and assessment an issue. That would at once have made the case one cognizable in equity. Citizens' Bank v. Gillespie, 115 Pa. 564, was an action at law in which such necessity was part of the issue, and the case had to be sent to a new trial for the reception of incompetent evidence on that point. Whether all the unpaid capital is required for payment of debts, or only part, and if so how much, are matters of judgment on the evidence, and different juries are likely to differ in their conclusions. The result would be that in numerous suits by the assignees some stockholders defendant might have to pay their subscriptions in full while some paid only part and others perhaps nothing at all. This would be incurring certain inconvenience and quite probably injustice, where the relief should not only be certain but uniform. As was well said by the learned judge below "there are more than forty defendants. Most of them live within the jurisdiction, some do not, and it is quite conceivable that there might be

hundreds living without the jurisdiction not reachable by our process at law. The question involved in all the cases is substantially the same namely, ought the corporation to collect in its unpaid capital? It is a pure question of law, and may be decided once for all in one suit as well as in a thousand. If the balance should not be collected from all, then it ought not to be collected from any. If, on the other hand, it should be collected, then none should escape."

In the absence of chancery powers in our courts, equitable relief was afforded wherever practicable, in common-law forms. When later the legislature granted equitable powers it was held that if the subject of a bill was one within the proper and established jurisdiction of chancery the invention of a new remedy in common-law form, or the extension of an old one, would not necessarily oust the equitable jurisdiction: Wesley Church v. Moore, 10 Pa. 273. The question in such cases turns on the completeness, adequacy and convenience of the remedy at law, and our decisions have been liberal in the consideration of all these elements: Kirkpatrick v. McDonald, 11 Pa. 387; Bierbower's Appeal, 107 Pa. 14; Brush Electric Co.'s Appeal, 114 Pa. 574; Johnston v. Price, 172 Pa. 427; Gray v. Citizens' Gas Co., 206 Pa. 303. In the last case it was said by our Brother Dean, "The question raised in this case is not alone whether plaintiff has a remedy at law, for that remedy it clearly has, but whether in view of the facts it is an adequate one. It may be conceded that the time is not very remote in our judicial history when a wronged party sought the intervention of equity and he could be truthfully met by the reply, you have a remedy at law in an action for damages, such reply would have been the end of his bill; he would have been turned out of court for want of jurisdiction. But this answer is no longer conclusive as to the jurisdiction; courts now go further and inquire whether under the facts the remedy at law is not vexatiously inconvenient, and whether it is so proximately certain as to be adequate to right the wrong complained of."

Testing by this standard the numerous actions that would be required at law, and comparing that remedy with the superior certainty, uniformity and convenience of the present bill, we have no hesitation in holding that it is a proper case for equitable jurisdiction. . . ..

## WASHINGTON COUNTY v. WILLIAMS.

(United States Circuit Court of Appeals, 1901, 111 Fed. 801.)

THAYER, J. . . . The third question above mentioned concerns the rights of the complainants in the equity case to sue in equity, and with respect to that question it is to be first observed that the causes of action sued upon are clearly of legal cognizance. The actions are founded upon a promise by the county to pay a certain sum annually out of a fund to be raised by the levy of a tax of one mill on the dollar on all property situated within the county which is subject to taxation. This promise, however, does not run to the holders of the obligations jointly, so as to compel them to unite in a suit to enforce it; for by issuing 149 obligations, each payable to bearer, and by reciting therein, in substance, that the sum raised annually would be apportioned pro rata among all the obligations, the county, in effect, promised to pay to each holder such a portion of the fund as he was entitled to receive. No reason is perceived why each holder of one or more of the obligations in suit may not sue at law, as one of them has already done, and obtain a judgment for the sum due to himself, by proving at the trial what sum would have been raised, and what part thereof would have been payable to him, had the tax been levied. Nor do we perceive that the remedy in equity is any more efficacious than at law. All that a court of equity can do is to determine the validity of the obligations, and render a money decree for the amount of the annual installments then due and unpaid. As much can be done by a court of law, and with equal facility. Moreover, after the validity of the obligations has been established, and a judgment obtained, resort must then be had to a legal remedy, to wit, a writ of mandamus, to compel the levy of a tax to pay the judgment, whether it be recovered at law or in equity, since it is a well-settled doctrine in the federal courts that a court of equity cannot command the levy of a tax; that being a duty which the legislature must impose; the sole function of the courts being to enforce its performance by mandamus when it has been imposed. Heine v. Levee Com'rs, 86 U. S. 655, 22 L. Ed. 223; Rees v. City of Water-

town, 86 U. S. 107, 22 L. Ed. 72; Stryker v. Board, 23 C. D. A. 286, 292, 77 Fed. 567. The argument in support of the right of the bondholders to unite and sue in equity on all of the obligations, in its last analysis, results in this proposition: That whenever several persons have distinct or several demands against the same person or corporation, growing out of contract, they may, for the purpose of avoiding multiplicity of suits, unite and sue in equity to enforce the payment thereof, provided their several demands were incurred by the defendant at the same time and in the same manner, and provided that the defendant interposes or threatens to interpose the same defense thereto. This proposition, in our judgmnt, is not sustained by any well-considered decision. . . .

It is obvious that, if the proposition contended for by the complainants in the equity case is tenable, then the holders of municipal bonds may always unite and sue in equity if the municipality repudiates its obligations, on the pretense that by so doing a multiplicity of suits will be avoided. Such a practice, however, has never obtained or been attempted, although actions upon such bonds have been very numerous, except in the instance above above cited, where the jurisdiction in equity was emphatically denied. As bearing incidentally on the point now under consideration, it may be further observed that in several cases before the supreme court where the question of jurisdiction, in view of the amount in controversy was involved, that court has inferentially recognized the right of several persons having distinct interests to unite in an appeal on grounds of convenience, provided their rights or liabilities grow out of the same transaction and give rise to the same questions. But in such cases litigants have never been permitted to aggregate their claims for the purpose of making up the amount necessary to confer jurisdiction unless they were able to show a common and undivided interest in the subject-matter of the litigation. . . .

Persons holding distinct claims arising out of contract, which may be reduced to judgment at law without difficulty, should not be allowed to aggregate them and sue in equity, even if they do grow out of the same transaction and involve the same questions, and even though a multiplicity of actions would thereby be avoided. If such a practice was tolerated, the boundaries of the jurisdiction of courts of law and equity would soon become confused or obliterated.

The result is that the bill in the equity case was properly dismissed for want of jurisdiction in equity, but such dismissal should have been without prejudice to the complainants' right to sue at law. . . .

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## VIRGINIA-CAROLINA CHEMICAL CO. v. HOME INS. CO. OF NEW YORK.

(United States Circuit Court of Appeals, 1902, 113 Fed. 1.)

JACKSON, District Judge. . . . A bill was filed by the Home Insurance Company of New York and the German-American Insurance Company of New York against the Virginia-Carolina Chemical Company and 14 insurance companies, who were made defendants to the bill. The defendant the Virginia-Carolina Chemical Company had prior to the filing of this bill instituted actions at law in the court of common pleas of Charleston county, S. C., against each and all of its codefendants. Motions were made in each case before that court to transfer the several cases to the circuit court of the United States for the district of South Carolina, which were overruled, and the court retained the cases. . . .

The object and purpose of this bill is to restrain the defendant insurance companies from the prosecution of these suits on the law side of the United States court, as well as elsewhere, to avoid a multiplicity of suits, and to have the cases all heard before the federal tribunal. The validity of these various policies of insurance is assailed for the reason that they were procured by fraud, misrepresentation, and concealment of the true value of the property insured; that the representations of the insured as to the value of the property were largely in excess of its value; that the various insurance companies, relying upon the good faith of the Virginia-Carolina Chemical Company, issued the policies upon the representation made by the defendant company. . . .

The main object and purpose of this bill is to prevent a multiplicity of suits, all involving the same legal questions, founded upon similar issues of fact; and for this reason in its nature it is ancillary to the actions at law. All the suits brought by the Virginia-Carolina Chemical Company against the various defendants seek to litigate the same

legal right, and the legal liability of the defendant companies, if any there be, is the same; the only difference being the amounts involved in the various policies. The plaintiff, the Virginia-Carolina Chemical Company, in the actions at law sets up a common demand against all the defendants. The object and purpose of this bill is to determine the liability of the different defendants in a court of conscience, and, if the court should reach the conclusion that there is a liability on each of the policies mentioned, then the question would be, what is the extent of the liability? It is apparent from the policies in this case that, if there is any liability at all, then under the condition of the various policies the same must be apportioned, and in order to do that a reference should be made to a master to ascertain the amount of liability upon each policy. But, if the court should reach the conclusion that these policies were issued upon a false state of facts as to the value of the property insured, and that the insured could not recover upon them, then, under the terms and conditions of the policies, a court of equity, in the exercise of its powers, would enjoin the plaintiff on the law side of the court from the further prosecution of its demands. . . .

The question presented by the demurrer in this case is whether or not all the defendants can be joined in one suit. This bill upon its face alleges that the defendants have a common interest in the questions involved, though their liability may be different. If it appeared from the face of the bill that there was not a common interest in the subject of litigation, and that there was no connection the one with the other, then the exception taken to the bill should be sustained. But, as we have seen, all the defendant insurance companies have a common interest in defeating the claims of one party, the plaintiff in the actions at law. On one side is the Virginia-Carolina Chemical Company, the plaintiff in the actions at law, while on the other side are the 14 insurance companies, who deny their liability to the Virginia-Carolina Chemical Company upon their policies of insurance. . .

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## HOLLAND v. CHALLEN.

(United States Supreme Court, 1883, 110 U. S. 15.)

FIELD, J. This is a suit in equity to quiet the title of the plaintiff to certain real property in Nebraska as against the claim of the de-

fendant to an adverse estate in the premises. It is founded upon a statute of that State which provides: "That an action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to such real estate."

The bill alleges that the plaintiff is the owner in fee simple and entitled to the possession of the real property described. It then sets forth the origin of his title, particularly specifying the deeds by which it was obtained, and alleges that the defendant claims an adverse estate or interest in the premises; that the claim so affects his title as to render a sale or other disposition of the property impossible, and that it disturbs him in his right of possession. . . .

A bill of peace against an individual reiterating an unsuccessful claim to real property would formerly lie only where the plaintiff was in possession and his right had been successfully maintained. The equity of the plaintiff in such cases arose from the protracted litigation for the possession of the property which the action or ejectment at common law permitted. That action being founded upon a fictitious demise, between fictitious parties, a recovery in one action constituted no bar to another similar action or to any number of such actions. A change in the date of the alleged demise was sufficient to support a new action. Thus the party in possession, though successful in every instance, might be harassed and vexed, if not ruined, by a litigation constantly renewed. To put an end to such litigation and give repose to the successful party, courts of equity interfered and closed the controversy. To entitle the plaintiff to relief in such cases, the concurrence of three particulars was essential: He must have been in possession of the property, he must have been disturbed in its possession by repeated actions at law, and he must have established his right by successive judgments in his favor. Upon these facts appearing, the court would interpose and grant a perpetual injunction to quiet the possession of the plaintiff against any further litigation from the same source. It was only in this way that adequate relief could be afforded against vexatious litigation and the irreparable mischief which it entailed. Adams on Equity, 202; Pomeroy's Equity Jurisprudence, Sec. 248; Stark v. Starrs, 6 Wall. 402; Curtis v. Sutter,

15 Cal. 259; Shepley v. Rangeley, 2 Ware, 242; Devonsher v. Newenham, 2 Schoales & Lef. 199.

In most of the States in this country, and Nebraska among them, the action of ejectment to recover the possession of real property as existing at common law has been abolished with all its fictions. Actions for the possession of such property are now not essentially different in form from actions for other property. It is no longer necessary to allege what is not true in fact and not essential to be proved. The names of the real contestants must appear as parties to the action, and it is generally sufficient for the plaintiff to allege the possession or seizin by him of the premises in controversy, or of some estate therein, on some designated day, the subsequent entry of the defendant, and his withholding of the premises from the plaintiff; and although the plaintiff may in such cases recover, when a present right of possession is established, though the ownership be in another, yet such right may involve, and generally does involve, a consideration of the actual ownership of the property; and in such cases the judgment is as much a bar to future litigation between the parties with respect to the title as a judgment in other actions is a bar to future litigation upon the subjects determined. Where this new form of action is adopted, and this rule as to the effect of a judgment therein obtains, there can be no necessity of repeated adjudications at law upon the right of the plaintiff as a preliminary to his invoking the jurisdiction of a court of equity to quiet his possession against an asserted claim to the property.

A bill quia timet, or to remove a cloud upon the title of real estate, differed from a bill of peace in that it did not seek so much to put an end to vexatious litigation respecting the property, as to prevent future litigation by removing existing causes of controversy as to its title. It was brought in view of anticipated wrongs or mischiefs, and the jurisdiction of the court was invoked because the party feared future injury to his rights and interests. Story's Equity, Sec. 826. To maintain a suit of this character it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law or be founded on undisputed evidence or long continued possession. Alexander v. Pendelton, 8 Cranch, 462; Peirsoll v. Elliott, 6 Pet. 95; Orton v. Smith, 18 How. 263.

The statute of Nebraska authorizes a suit in either of these classes of cases without reference to any previous judicial determination of

the validity of the plaintiff's right, and without reference to his possession. Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse estate or interest in it, for the purpose of determining such estate and quieting the title.

It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property, necessarily affecting its use and enjoyment, should be removed; for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of every-day observation that many lots of land in our cities remain unimproved because of conflicting claims to them. The rightful owner of a parcel in this condition hesitates to place valuable improvements upon it, and others are unwilling to purchase it, much less to erect buildings upon it, with the certainty of litigation and possible loss of the whole. And what is true of lots in cities, the ownership of which is in dispute, is equally true of large tracts of land in the country. The property in this case, to quiet the title to which the present suit is brought, is described in the bill as unoccupied, wild, and uncultivated land. Few persons would be willing to take possession of such land, enclose, cultivate and improve it, in the face of a disputed claim to its ownership. The cost of such improvements would probably exceed the value of the property. An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming ownersip is not in possession, the land must continue in its unimproved condition. It is manifestly for the interest of the community that conflicting claims to property thus situated should be settled, so that it may be subjected to use and improvement. To meet cases of this character, statutes, like the one of Nebraska, have been passed by several States, and they accomplish a most useful purpose. And there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the States should not be enforced by the federal courts, when the controversy to which it may give rise is between citizens of different States. . . .

## WOODWARD v. SEELY.

(Supreme Court of Illinois, 1849, 11 Ill., 157.)

Trumbull, J. This bill was filed to restrain the defendants from prosecuting certain actions which they had commenced, and perpetually to enjoin them from instituting others, to recover damages for the overflow of their lands; the complainants alleging that said overflow was by the license and permission of the defendants and occasioned by the erection of a mill-dam upon their own land, which they had been at great expense in constructing. None of the actions at law had been disposed of, when the bill was filed, though several were then pending, and the defendants were continuing to commence them at intervals of every few days.

Can this bill be maintained? We think not. There is no instance in which a bill of peace, where the parties were not numerous, has been sustained, to prevent multiplicity of actions at law, before the rights of the parties have been settled in a Court of law. The principle that a party cannot come into equity to enforce his rights, when he has a full and complete remedy at law, is too familiar to require the citing of authorities to support it. The license in this case, if valid and effectual, constitutes a complete defense at law; and until that defense has been established, and the defendants continue afterwards to harass the complainants by vexatious suits, chancery has no jurisdiction in the matter. Eldridge v. Hill, 2 John. Ch., 281; West v. Mayor, &c., New York, 10 Paige 539. . . .

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## SYLVESTER COAL CO. v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, 1895, 130 Mo. 323, 32 S. W. 649.)

Brace, P. J. This is an appeal from a judgment of the circuit court of the city of St. Louis, sustaining a demurrer to plaintiff's petition. The material allegations of the petition are, that the plaintiffs, the Sylvester Coal Company, The Berry-Horn Coal Company, The St. Louis Fuel Company and the Lebanon Machine Association,

are, respectively, corporations created under the laws of the state of Missouri and engaged in the business of selling and delivering coal by the wagon load, to be used as fuel in the city of St. Louis; that they are licensed merchants and have paid their tax as such; that each of the plaintiffs maintained in its business a private scale, on which all coal sold and delivered is weighed, the weigher of which has been approved by the mayor, taken an oath before the city register, and filed bond as required as weigher at public scales; that fifty other persons or corporations are engaged in the same business in like manner; that the city has adopted and there are now ordinances in force in said city as follows: . . .

That said sections 1594 and 1608, aforesaid, are invalid and of no force or effect, because the system established by them constitutes a tax on sales and deliveries of coal in St. Louis for fuel, and exacts three cents for each load so sold and delivered, which sum is paid into the treasury of the city of St. Louis; because said system is an unlawful interference with and burden on the sale and delivery of coal as fuel in St. Louis; because said system is unauthorized by the charter of St. Louis and the law of the land; because said system and said ordinance regulations are unreasonable and oppressive; because said regulation requiring a green ticket to be delivered with each load of coal adds no security to the purchaser as to the weight of the coal delivered, nor does it operate or constitute any check on the seller of the coal as to such weight; that the expense to each of these plaintiffs for green tickets so to be used by it respectively and purchased of the city of St. Louis, exceeds $150 annually; that the said defendants the city of St. Louis and the mayor thereof, nothwithstanding the manifest illegality of said ordinance have thereafterwards published and declared that they will enforce the observance of the provisions thereof. Wherefore they pray that they and their servants be restrained from so doing.

1. The demurrer is general, and the only question to be considered is whether the facts stated are sufficient to entitle the plaintiffs to the relief sought. It is contended that, though it be conceded that the ordinances are invalid, the plaintiffs are not entitled to injunctive relief on the facts stated, for the reason that they have an adequate remedy at law.

But is the remedy at law adequate? It must be remembered that the injury complained of here is continuous. The ordinances are continuous, and plaintiffs' business is continuous, and, under the ordinances, for

each wagon load of coal sold and delivered in violation of the restrictive provisions thereof the plaintiffs each become subject to an action in the municipal courts of the city for such violation. The fact that in each of such suits the plaintiffs might plead successfully the invalidity of the ordinances as a defense thereto, does not give them an vexation and annoyance of such a multiplicity of suits in consequence adequate remedy. They are entitled to be protected from the expense, of their continuance of a legitimate business except upon compliance, with the condition of ordinances which it is alleged are and may be utterly void. Mayor, etc., v. Radecke, 49 Md. 217; Davis v. Fasig, 128 Ind. 271; Rushville v. Rushville Natural Gas Co., 132 Ind. 575; Third Ave. R. R. Co. v. Mayor, etc., 54 N. Y. 159.

"The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction." High, Injunctions (3 Ed.), p. 12. This has been frequently recognized as a ground for the exercise of such jurisdiction in this state. Swope v. Weller, 119 Mo. 556; Michael v. St. Louis, 112 Mo. 610; Carroll v. Campbell, 108 Mo. 558. And is an independent ground of equity jurisdiction upon which such courts may interfere to prevent municipal authorities from transcending their powers. 2 Dillon, Mun. Corp. (4 Ed.), secs. 906 and 908; and cases cited above.

While under the former system of jurisprudence, in which relief in equity was administered by a different tribunal and by a different procedure from those that gave relief at law, courts of equity have sometimes refused to interfere before the right was established at law (West v. Mayor, etc., 10 Paige, 539), there seems no good reason, under the present system in code states where both are blended, why such relief should not be granted in the first instance by injunction; and so it was ruled in the analogous cases of Mayor, etc., v. Radecke; Davis v. Fasig, and Rushville v. Rushville Nat. Gas. Co., above cited, which are on all fours with the case in hand. And so it would seem it must be ruled here, where we have in addition a special and liberal statutory provision in regard to injunction. R. S. 1889, sec. 5510.

The doctrine that criminal statutes can not be tested or their enforcement restrained in the civil courts has no application to the case. Municipal ordinances, though penal, are not criminal statutes. City of Kansas v. Clark, 68 Mo. 588; Ex Parte Hollwedell, 74 Mo. 395;

St. Louis v. Marchell, 99 Mo. 475. They are quasi criminal in form, but not so regarded in procedure.

We think the petition presents a case in which the validity of the ordinances may be inquired into by a court of equity, and if found to be invalid, the relief prayed for may be granted. . . .

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## GALVESTON, H. & S. A. RY. CO. v. DOWE.

(Supreme Court of Texas, 1888, 70 Tex. 5, 7 S. W. 368.)

GAINES, J. This suit was brought in the court below by appellant against appellee for the purpose of enjoining the latter from collecting a certain judgment rendered in the county court of Maverick county, and from bringing separate suits on certain claims against the appellant. The question of the power of the district court to enjoin the judgment of the county court is settled by the opinion in the case between the same parties delivered by the commissioners and adopted by this court at the present term. See Railway Co. v. Dowe, 6 S. W. Rep. 790. In regard to the claims upon which suits are sought to be enjoined, the petition alleges in substance that in the year 1882 certain contractors on the company's road issued to their laborers a large number of written obligations, known as "Contractors' Time-Checks," which had been indorsed by the payees in blank and assigned by them; and that defendant, Dowe, was the holder of about 30 of these, for amounts ranging from $5 to $30, and aggregating about the sum of $1,000. It is also alleged, that these claims were assigned solely by the contractors, and that the plaintiff was not a party to them in any sense, and was not liable for their payment, and further that they were barred by the statute of limitations, but that defendant had instituted suits upon similar demands against plaintiff alone in the justice court, and had obtained judgment on them, and had threatened to bring in the same court, one suit for each month upon one of the claims until all were sued on. The averments of the petition show a perfect defense to the claims; that this defense was set up in each of the suits brought in the justice court; and that appellant moved to consolidate the actions; but that the court refused the motion, and notwithstanding its defenses gave judgment in every instance against it. It also appeared from the

petition that in each case, except one, the amount in controversy was less than $20, and hence there was no appeal. In the one case the amount was less than $100, and therefore the judgment of the county court in that suit was final. An exception to appellant's petition was sustained, and its suit dismissed; and this it assigns as error.

It is said that the prevention of a multiplicity of suits is a favorite ground for the interposition of a court of equity; but it appears from an examination of the authorities that the application and limits of the doctrine are not well defined. It had its beginning in the bill of peace, a remedy rendered necessary by the principle of the common law that a judgment in an action of ejectment in favor of the defendant was not conclusive and did not estop the plaintiff from bringing successive suits upon the same cause of action. In order to relieve a defendant from vexatious litigation, after a judgment at law in his favor, the court of chancery permitted him to file his bill, and by its decree to preclude the plaintiff from vexing him with any further suit. The principle has been extended to cases where a great number of parties, having a common cause of action against one, growing out of the same injury and depending upon the same questions of law and fact; and they have been permitted to join in the same action in order to prevent a multiplicity of suits. This rule was applied in this court in Blessing v. City of Galveston, 42 Tex. 641, and in George v. Dean, 47 Tex. 73. Also, where numerous persons have claims of the same character growing out of the same alleged wrong against one, a bill will be in his favor against all the claimants to settle all the demands in the same suit. Water-Works v. Yeamans, L. R. 2 Ch. 8. It is also laid down that where one party holds several claims against another, growing out of the same or similar transactions, and depending for their determination upon the same question of law and fact, equity will enjoin separate suits upon the demands, provided one suit has been tried and determined in favor of the complainant in the bill. 1 High, Inj. sec. 63 et seq.; 1 Pom. Eq. Jur. sec. 254 et seq. In West v. Mayor, 10 Paige, 539, a multiplicity of suits were sought to be enjoined, and the bill showed that in a suit upon one of the demands, the judgment had been against the complainant in the justice court, and he had appealed. The chancellor dissolved the injunction and said: "It is true that they complain that in those cases the court decided the law against them, and did not submit the legality of the ordinances to the jury to be decided as a matter of fact, and that they intend to carry the ques-

tion as to such legality before a higher tribunal for a decision. But neither of those circumstances can give jurisdiction to this court to interfere before the right of the complainants is established by such higher tribunal. If they are successful there, it is not probable that the interference of this court will be necessary." In the very similar case of Railroad Co. v. Mayor, 54 N. Y. 159, an injunction was sustained as to all suits but one, until the rights of the parties could be determined in the action which was permitted to be brought. In Tarbox v. Hartenstein, 4 Baxt. 78, the defendant had been an employe of the plaintiff, under a yearly contract, his wages being payable weekly, and had been discharged before the contract expired, on the ground that he failed to perform the stipulations on his part. He was paid wages accruing thereafter and recovered judgment, which was paid. up to the time of his discharge. He brought suit for his first week's wages accruing thereafter and recovered judgment, which was paid He sued again for the next week's wages, and recovered a judgment, from which an appeal was taken. He brought also a third suit, and announced his purpose to bring a suit for each week's wages as it accured, as long as by the terms of the contract it was to have continued in force. The court held that it was an entire contract for the year, though the wages were payable by the week, and that the judgment in the first suit was conclusive of his rights, and precluded any further recovery, and perpetually enjoined him from prosecuting the actions already brought, and from bringing any other. It is to be remarked, that although the judgment in the second action (which was the first in which res adjudicata could have been pleaded) had gone against the complainants, and although they had a complete remedy at law against such successive actions, yet the court of chancery assumed jurisdiction in order to prevent vexations litigation, and restrained the defendant from prosecuting any further suits. The decree of the chancellor was affirmed in the supreme court.

In the present case the suits already brought have resulted adversely to appellant; and if we apply the rule that it must first have a decision in its favor, the judgment now appealed from must be affirmed. But we doubt if this rule should ever be applied in cases of this particular character. The courts which have adopted it have as we think followed the analogy of the original bill of peace, without sufficient reason. In the case of a bill of peace the court of chancery interfered, because there had been a trial at law which was not conclusive, and its inter-

position was necessary in order to prevent vexatious litigation. That court had no power to try title to land, and hence could not entertain a bill of peace until the title had been decided at law in favor of the complainant. The object of the bill was to prevent vexatious litigation, but a judgment at law establishing the title of the complainant was the necessary foundation of the procedure. But the case is different where a party claiming a just defense to a multitude of demands held by one person against him, and all of the same character, and involving precisely the same questions, seeks relief against the vexation, expense, and trouble of defending as many separate actions. When separate suits are brought and threatened, why await the determination of one? It seems to us that the unnecessary expense and vexation necessarily resulting from such a multiplicity of suits should be deemed a sufficient ground for the interposition of the district court under our system,—that being a court of blended jurisdiction. But we need not go so far. We are not called upon to deny the doctrine applied in West v. Mayor, supra. The opinion in that case shows that from the judgment of the justice of the peace the complainants had an appeal to a court whose decision would establish a legal precedent. If it be said that a court of equity will only act after a decision favorable to the complainant in a court of law in which the judges are required to be lawyers, we can see the reason of it. But we do not think this rule should be applied to judgments of the county and justice courts under our system, when the amount in controversy is not such as to permit appeals to "the appellate court." The officers who preside in these tribunals are not required to be learned in the law. Their judgments, not appealed from, are conclusive between the parties as to the subject-matter of the particular suit in which they are rendered; but they cannot be said to affect in any manner any general right. Had it appeared from the plaintiff's petition that one of the suits against it had been brought in the district court, and had there been decided against it, or that from a judgment in the county court it had appealed to the court of appeals, and that court had affirmed the judgment upon the merits, then the presumption would have been great that it had no just defense to the other actions. Acting upon this presumption, a court of equity might well decline to interfere. But no such presumption arises from a judgment of the justice or county court in this state, when by reason of the amount in controversy there can be no appeal. Therefore, when a

case for the interposition of a court of equity, in order to prevent a multiplicity of suits, is presented, the action of the court should not be affected by such judgments, whether it be favorable or unfavorable to the complainants. In the case of the Water-Works v. Yeamans, supra, the English court of chancery awarded an injunction against a large number of defendants, who each held a separate claim against the company, growing out of the same alleged injury, though no right had been established by any suit at law; and we see no reason why the relief should have been refused, if all the claims as in this case had become the property of a single holder. The rule is, that if in the tribunal, which has jurisdiction of the demands, there can be a consolidation, then it is the duty of the party to resort to this remedy, and equity will not interfere. In such a case there is an adequate remedy at law. But in this, though the demands separately are within the jurisdiction of the justice court, the aggregate amount exceeds that jurisdiction. Hence they cannot be consolidated. Besides, in order, it would seem, to prevent even a partial consolidation and to increase the expense, the defendant had determined to bring a separate suit to each successive term of the court. According to the allegations of the petition (which the demurrer admits to be true) it is a clear case in which the appellee is about to avail himself of his right to bring separate suits in the justice court, in order to vex and harass the appellant by a multiplicity of actions; and in which the appellant has no means of protecting itself against the attempted wrong except by a resort to the writ of injunction. This remedy is a relief to appellant, and works no hardship to appellee, who can set up his demands in the action, and thus have the litigation determined in one proceeding. Our system of procedure is essentially equitable in its nature, and was designed to prevent more than one suit growing out of the same subject-matter of litigation; and our decisions from the first have steadily fostered this policy. Chevalier v. Rusk, Dall. Dig. 611; Binge v. Smith, Id. 616; Clegg v. Varnell, 18 Tex. 294.

We conclude, therefore, that the exceptions to so much of the petition as sought to enjoin the collection of the judgment of the county court should have been sustained, and that the exceptions should have been overruled to so much thereof as sought to enjoin appellee from bringing separate suits upon his demands; and that the court erred in sustaining the entire exceptions and in dissolving in whole

the injunction and dismissing the bill. For the error pointed out, the judgment is reversed, and the cause remanded.

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## SKINKLE v. CITY OF COVINGTON.

(Kentucky Court of Appeals, 1885, 83 Ky. 420.)

PRYOR, J. The city council of Covington having as a legislative body the complete control of the streets, lanes, alleys, wharves, landings, etc., within the corporate limits, with the right to pass such ordinances and by-laws as may be necessary for the better government of the city and to legislate on all subjects that the good government of the city may require, and affix penalties for the violation of its ordinances not exceeding fifty dollars, on the eighth of February, 1883, enacted an ordinance declaring "it unlawful for any person, unless by ordinance, resolution, or written authority of the council, or under the laws of Kentucky, to hold the exclusive possession of any of the streets, lanes, alleys, commons, spaces, squares, wharves, or landings belonging to the city of Covington, or any part thereof."

The penalty for a violation of the ordinance is the imposition of a fine in the mayor's court of fifteen dollars for each twenty-four hours the person charged may be found guilty of a violation of the ordinance, and the costs of proceeding, etc.

In a few days after the passage of this ordinance a warrant was issued in the name of the city against the appellant, charging him with violating its provisions. The case was heard in the mayor's court, and a fine imposed on the appellant of fifteen dollars, from which an appeal was taken to the quarterly court and dismissed for want of jurisdiction. Another warrant was then issued for a further violation of the ordinance by the appellant, and soon after as many as twelve or fifteen complainants entered against him by the city, involving his disregard of the ordinance, and asking for a summons against him. . . .

The facts stated entitled the appellant to an injunction restraining the city from proceeding under its warrants until the controversy as to the use and possession of the property in question could be determined. Here was a controversy between the city and the appellant as to the use of the river bank as a harbor for his coal-boats in common

with others. There was no wharf or city landing at this point—no street or any way belonging to the city obstructed, but the use in common with those who had coal and flat-boats on the river by using the shore as a place of fastening their boats, and of loading and unloading them when they saw proper.

No right of the city had been invaded by the appellant; but, on the contrary, the latter had used this part of the river bank as a matter of right. The judgment against the city in January, 1871, gave to the heirs of McNickle the possession and use of the premises for twenty-five years, and the appellant entered under the claim of McNickle's heirs in 1874.

The facts alleged in the petition are all admitted by the demurrer, and present a case where the city must adopt a civil remedy for relief if the facts alleged are not true, or litigate the right of the appellant to the use of the property in the present action.

Fines and penalties can not be imposed against one who is rightfully in possession under the ordinance in question. It is intended to punish the trespasser, or those who, without right, are appropriating the property of the city to their own use, but can not be enforced against one who has the right to the use. The decision upon the warrant in the mayor's court does not determine this right; but if the facts alleged are true, the appellant is being punished by fine for exercising a right of which he can not be deprived without due process of law, and which he was exercising at the time the ordinance was passed. His ordinary remedy against the city for the wrong complained of would not stay proceedings upon the multiplied warrants against him, and in such a state of case we see no reason why a court of equity should not entertain jurisdiction, and stay all proceedings on the warrants until the matters alleged in the petition are heard and determined.

The aid of a court of equity cannot be invoked so as to interfere with proceedings of subordinate tribunals, unless to prevent irreparable injury or a multiplicity of suits. (Ewing v. City of St. Louis, 5 Wallace, 413; The Mayor of Brooklyn v. Meserole, 26 Wend., 132.)

The ordinance passed by the city is not void, but in accordance with law, and without any discrimination in its provisions as between the citizens of Covington, and the real ground for going into a court of equity is the illegal use made of this ordinance against a party who is without remedy at law, and who must be compelled to surrender

his right to the use, title and possession of property in order to avoid the imposition of penalties upon him that, when enforced, must work irreparable injury.

It can not well be said that the city or its authorized agents are trespassers when the proceeding against the appellant is by warrant for a violation of the ordinance, and the judgment rendered by a court having jurisdiction over the subject-matter and the parties.

In the case of the Trustees of Louisville v. Gray, reported in 1 Littell, 147, Gray attempted to build a warehouse upon ground to which he claimed title, and the city authorities, claiming that the wall of the building was on a street of the city, proceeded to enforce the penalty of four dollars and costs against Gray for the obstruction. Gray obtained an injunction, that was perpetuated, upon the ground that he and not the city was vested with the title, and this court affirmed the judgment, holding that a court of equity could entertain the jurisdiction for the purpose of quieting the title.

In this case no action at law can be maintained for an entry on appellant's possession, for none has been made. He has no appeal from the judgment of the municipal court enforcing the ordinance, and is met with a warrant, in the name of the city, under which he is fined fifteen dollars for each twenty-four hours that he uses the river bank, or permits his boats to remain there.

By this mode of proceeding the civil remedy by the city is ignored, and the appellant compelled to abandon the possession in order to avoid the penalties. The injury is irreparable, and a court of equity should not hesitate to grant the relief.

The judgment is therefore reversed, and the cause remanded, with directions to overrule the demurrer and award the injunction, etc.

## CHAPTER XI. MISCELLANEOUS.

### LENT v. HOWARD.

(Court of Appeals of New York, 1882, 89 N. Y. 169.)

ANDREWS, CH. J. We are of opinion, that the executors were properly held to account for the rents and profits of the real estate received by them, and for the proceeds of sales of real estate made under the power conferred by the will. . . .

We think there was by the ninth section of the will in question, a conversion of the testator's real estate (except the homestead farm,) into personalty as of the time of his death, and a gift of the converted fund, together with the intermediate income, to the testator's wife and daughter, with cross remainders. It is true that the power of sale is not in terms imperative. The words are those conferring authority, and not words of command or absolute direction. But it is clear that a conversion was necessary to accomplish the purpose and intention of the testator in the disposition of the proceeds, and when the general scheme of the will requires a conversion, the power of sale operates as a conversion, although not in terms imperative. (Dodge v. Pond, 23 N. Y. 69.) The conversion also will be deemed to be immediate, although the donee of the power is vested, for the benefit of the estate, with a discretion as to the time of sale. (Stagg v. Jackson, supra; Robinson v. Robinson, 19 Beav. 494.) We are therefore of opinion, that the rents and profits of the real estate received by the executors, and the proceeds of sales, were properly brought into the accounting. . . .

### BEELER v. BARRINGER.

(Supreme Court of Illinois, 1911, 252 Ill. 288, 96 N. E. 874.)

FARMER, J. This is a writ of error sued out to review a decree of the circuit court of Montgomery county for the re-conversion of personal property into real estate. . . .

There is no controversy upon the proposition that under the will the defendants in error took no title to the land; that where land is devised and by the terms of the will is directed to be converted into money and the money distributed to the devisees and legatees, it is a devise of money and not of land. Neither is there any controversy that under such a devise, if the devisees are under no disability and all agree to do so, they may elect to take the land instead of the money. Plaintiff in error also concedes that a "court of equity may, if it appears to be to the advantage of an infant, direct a re-conversion in his behalf, if at the time of such re-conversion the infant is presently entitled to the fund." It is contended, however, that the right to elect a re-conversion only exists where the beneficiary, whether adult or minor, is entitled to the present enjoyment of the fund or property.

By the will of their father defendants in error would become entitled to the possession and use of the gift upon their respectively attaining the age of twenty-one years. But one of them had arrived at that age when the bill in this case was filed and the decree entered thereon, and the youngest was but ten years old. We do not think the right of a devisee to elect a conversion or re-conversion of money into land or land into money is dependent upon his right to the present enjoyment of the gift at the time the election is made. . . .

We are of opinion there was no error in decreeing a re-conversion and enjoining the sale of the land, but that part of the decree directing the trustee and executor to release and turn the land over to the minors at once was erroneous. The duty was imposed by the will upon the trustee of managing and controlling the property of the minors until they respectively, arrived at the age of twenty-one years. Until the land was sold he was to manage and control the land, and when it was sold the proceeds were to be invested by him in safe securities at the best rate of interest obtainable, and kept so invested by him until the time fixed for distribution arrived. Re-conversion defeats the distribution of the testator's property in money, but the right of re-conversion does not carry with it the right to defeat the will of the testator that the possession and enjoyment of the property should be postponed until the beneficiaries, respectively, became twenty-one years old. Under the evidence the chancellor was justified in concluding that it was for the best interests of the minor defendants in error that they take the land instead of the proceeds of its sale,

but the election to so do did not authorize a disregard of the will fixing the time at which the beneficiaries should come into its enjoyment. The control and management of the property of the minor defendants in error should be left in the trustee until the time fixed by the will for distribution. . . .

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## CURTEIS v. WORMALD.

(In Chancery, 1878, 10 Ch. D. 172.)

Jessel, M. R. The point which I have to consider and to decide is this: A testator directed his trustees—for although the same persons may have been appointed executors they are for this purpose trustees, and trustees only—to lay out his residuary personal estate in the purchase of real estate, freeholds and copyholds, to be settled to certain uses, comprising a long series of limitations. The residue was ascertained, that is, the testator's debts and legacies and funeral and testamentary expenses were all paid, and then the residue was at different times laid out by the trustees, pursuant to the will, in the purchase of freehold and copyhold estates, which were conveyed so as to vest the legal estate in the trustees.

That being so, the limitations took effect to a certain extent, and then, by reason of failure of issue of the tenants for life, the ultimate limitations failed, and there became a trust for somebody. Now, for whom?

According to the doctrine of the Court of Equity, settled, if I may say so, by the well-known case of Ackroyd v. Smithson (1 Bro. C. C. 503,)—for it has always been the law of this Court since—this kind of conversion is a conversion for the purposes of the will, and does not affect the rights of the persons who take by law independent of the will. If, therefore, there is a trust to sell real estate for the purposes of the will, and the trust takes effect, and there is an ultimate beneficial interest undisposed of, that undisposed of interest goes to the heir. If, on the other hand, it is a conversion of personal estate into real estate, and there is an ultimate limitation which fails of taking effect, the interest which fails results for the benefit of the persons entitled to the personal estate, that is, the persons who take under the

Statutes of Distribution as next of kin. Their right to the residue of the personal estate is a statutory right independent of the will.

The result is that in the case I put there is a trust for the next of kin. How any one could imagine it was a trust for anybody else it is difficult to understand; and had I not been referred to the judgment of a very eminent Judge on this subject I should have said it was impossible to understand it.

There certainly is authority for saying—a single authority, and an authority standing alone—that the ultimate trust is not for the next of kin, but for the executors. Why? The executors have ceased to have anything whatever to do with the matter. They have paid over the legacy to the legatee, who happens to be a legatee-trustee, and who holds it by law, under the Statutes of Distribution, as trustee for the next of kin, and no one else. By what process of reasoning any other result can be arrived at I have been unable to discover. The decision to which I have referred is one which, to my mind, is utterly opposed to the whole law upon the subject.

Then the next question which arises is, how does the heir-at-law in the first case, or the next of kin in the second, take the undisposed-of interest? The answer is, he takes it as he finds it. If the heir-at-law becomes entitled to it in the shape of personal estate, and dies, there is no equitable reconversion as between his real and personal representative, and consequently his executor takes it as part of his personal estate.

On the other hand, if the next of kin, having become entitled to a freehold estate, dies, there is no equity to change the freehold estate into anything else on his death; it will go to the devisee of real estate or to his heir-at-law if he has not devised it, and will pass as real estate. . . .

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## WETHERILL v. HOUGH.

(New Jersey Court of Chancery, 1894, 52 N. J. Eq. 683, 29 Atl. 592.)

Bird, V. C. William Wetherill was the owner of certain lands and died seized thereof, leaving him surviving several children, one of whom was named Sarah M., who married John S. Hough. Sarah

M. died January 10th, 1875, leaving her surviving the said John S. Hough and Frances Eleanor A. E. Hough, their only child. The title of the said lands which descended to Sarah Hough at her death passed to her daughter, the said Frances Eleanor A. E., subject to the estate by the curtesy of her father. The complainants were the brothers and sisters of the said Sarah, and consequently the uncles and aunts of the said Frances Eleanor, and they claim that the fee of the said lands would have descended to them (had it not been disposed of as hereinafter will appear) as the heirs-at-law of the said Frances Eleanor.

During the lifetime of Frances, by an order of this court, a portion of the said lands, of the value of $200, was conveyed to the gas company of the city of Atlantic City, and $80 paid for a right of way over a lot of land in Atlantic City. And $1,320.64 was paid for land taken by the Chelsea Branch Railroad Company, under the exercise of the right of eminent domain. . . .

The court is asked to declare that these moneys are to be treated as real estate, and consequently pass, by the statute of descent, to the complainants, who are the uncles and aunts of the said Frances Eleanor, subject only to the tenancy by the curtesy of the said John S. as the husband of the said Sarah.

As to the $200, it is insisted upon the part of the defendant, John S. Hough, that since the lands of the infant of that value were converted into money by the order and direction of the court, it must be presumed to have been in the interest, or for the benefit of the infant, and that it was consequently such a conversion as would have resulted if Frances Eleanor had been of age and performed the same act in person. It is claimed that this was a voluntary, as distinguished from a compulsory, conversion, such as characterizes the sale of lands under the statute by executors and administrators for the payment of debts of decedents, when the question arises as to whether any surplus remaining must be treated as real estate or as personality.

The $200 must be treated as real estate. The case most nearly like this which has been considered by our own courts, is that of Snowhill v. Snowhill, 2 Gr. Ch. 20, which was before the chancellor on demurrer, and before the court of errors and appeals, as appears in the opinion of Chancellor Pennington, in 1 Gr. Ch. 30. The decision of the court of errors and appeals in that case has not been reported, but it appears from the case of Oberle v. Lerch, 3 C. E. Gr.

350, that the correctness of the decision was very seriously questioned by the counsel and an effort made to have it overruled, but after full consideration and a review of a number of authorities, the chancellor, without qualification, approved the decision of the court of errors and appeals, in the case of Snowhill v. Snowhill. The case of Oberle v. Lerch was taken up on appeal (3 C. E. Gr. 575) and the decree of the chancellor affirmed. Now, in the Snowhill Case, the legislature by special enactment authorized the guardian of an infant to sell certain real estate belonging to the infant. After such sale the infant died, and the question presented for the determination of the court was whether the proceeds of such sale should be treated as real or personal estate. The chancellor, on demurrer, decided that it should be treated as personalty which passed to the representative of the infant, while the court of errors and appeals decided that it should be treated as real estate and that it descended to the heir-at-law of the infant.

The rule to be extracted from this case is that where there is a compulsory conversion of the real estate of an infant, the proceeds during the minority of the owner retain the character of real estate for the purposes of devolution and transmission. . . .

The cases show that where the conversion is compulsory, i. e., against the will or without the consent of the owner, the fund will be treated as real estate until the owner, being sui juris or of disposable capacity, manifests a willingness to accept it as personal.

The $80 must be controlled by a different rule. The parties claiming it were, at the time of the sale, sui juris, and undertook to convey to and secure the entire fee (including that of the infant) in the grantee. The $80, which represented the supposed interest of the infant was paid to her guardian. The complainants have not the shadow of a right to claim the proceeds of that transaction, which represented the interest of the infant as real estate. I will advise a decree in accordance with these views.

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## MAKEPEACE v. ROGERS.

(In Chancery, 1865, 4 DeG., J. & S., 649.)

The bill in its 2d paragraph alleged, that in 1859 the respondent had appointed the appellant to be the agent and manager of the

respondent's real estate at Bracknell, in Berkshire, and at Bromley, in Kent, and of certain houses in London belonging to the respondent, with authority to receive the respondent's rents of the said estate and houses; and that the respondent had given the appellant a power of attorney to receive the dividends and interest of certain bank-stock and other stocks, funds, shares, and securities belonging to the respondent; that the appellant had acted as such agent and manager of the respondent's aforesaid estates and houses, and from time to time received the rents thereof, and from time to time received the dividends and interest of certain bank-stock and other stocks, funds, shares, and securities, or of such of the said estate, houses, and other property aforesaid as from time to time remained unsold, down to the determination of the appellant's employment by the respondent at the end of 1863.

The bill then charging in effect that the appellant had had almost uncontrolled authority in the management of the respondent's estates, houses, and other property aforesaid, and had by his directions sold certain timber on the estates and also divers parts of the estates, houses, and other property themselves, and received the proceeds of sale, but had rendered none but meagre and unsatisfactory accounts of his receipts generally, and refused or omitted to give any better accounts or any vouchers for his expenditure, and alleging (in its 16th paragraph) that the appellant had in his possession or custody or under his control divers deeds, probates of wills, books, maps, plans, and other documents and muniments of title belonging to the respondent which he ought to deliver up to the respondent, prayed (1) an account of the appellant's receipts for or on account or on behalf of the respondent, or which might have been received by the appellant but for his willful default or neglect; (2) an account of the appellant's payments to the respondent or to his use or on his behalf; (3) payment of the balance to be found due; (4) delivery by the appellant to the respondent of all deeds, probates of wills, books, maps, plans, muniments of titles, paper, and documents belonging to the respondent or relating to his estate; (5) payment by the appellant of the costs of the suit; and (6) general relief. . . .

The Lord Justice KNIGHT BRUCE said that this was one of the clearest cases that had ever come under his Lordship's notice, and that he was surprised at the demurrer, and surprised at the appeal. The bill was filed by a land-owner against a person whom he had for

some years employed as the agent and manager of his estates, and the allegations of its 2d paragraph were these: (His Lordship read the passage in question and proceeded.) Had there been nothing else in the case than this the plaintiff would have been entitled to a decree. His Lordship did not think that the Lord Justice, when as Vice-Chancellor he had disposed of Phillips v. Phillips, (9 Hare, 471), had intended to say that a bill in equity for an account would not lie unless there had been receipts and payments on both sides. (See Porter v. Spencer, 2 John. Ch. 171; 1 Story Eq. Jur. sec. 458; Adams Eq. 5th Am. ed., 222, note 1.) The existence of a fiduciary relation between the parties, as, for example (as was the case here), that of principal and agent, was sufficient to confer jurisdiction on this Court, and allegations of fraud or special circumstances were unnecessary. No doubt if there had been between the parties a stated and settled account, or an executed release, it might be necessary for the plaintiff to show a special case to induce this Court to grant the relief sought. But no such case arose here. Beyond which, the claim set up by the present plaintiff against the defendant his steward in the 16th paragraph of the bill, and in respect of which relief was sought by the 4th paragraph of the prayer, extending, as that claim did, not to discovery only, but to delivery up to the plaintiff of the muniments in question, was alone sufficient to entitle him to relief in this Court. The demurrer and the appeal were alike to be reprobated.

The Lord Justice Turner said that this was clearly not a case in which their Lordships could, in justice to the Vice-Chancellor, to themselves, or to the principles of the Court, call upon the counsel for the plaintiff. The claim and prayer in the bill as to the documents were alone sufficient to support it, any provisions of the Common Law Procedure Act, 1854, or legal rights enforceably by action notwithstanding. But it was not necessary to decide the case upon these grounds, for upon the demand for an account it was equally clear. Although it might be that in a simple case a more convenient course would be to apply for relief to a Court of Common Law, still as between principal and agent, there existed that fiduciary relation which gave jurisdiction to this Court to interfere on behalf of the principal suing his agent as such; and the existence of fraud was not, although the contrary had been contended at the bar, a necessary element to give jurisdiction to this Court to interfere in such a case. Mackenzie v. Johnston, 4 Madd. 373, was in point to the contrary.

Phillips v. Phillips, 9 Hare, 474, in which his Lordship had commented on that case, went upon the footing of the account there in question being a current account between the parties; and the bill made no case of general agency, alleging only an isolated agency transaction connected with the sale by the defendant of some railway shares belonging to the plaintiff. That case had no reference to a case of general account between principal and agent; and if his Lordship's language in giving judgment in that case had been in fact such as to give rise to misapprehension, such misapprehension ought to have been dispelled by what he had said in the subsequent case of Padwick v. Stanley, 9 Hare, 628, when adverting to the want of correlation between the rights of a principal and an agent to sue in this Court. In the present case the Vice-Chancellor's conclusion was perfectly correct, and the appeal must be dismissed, with costs.

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## FLUKER v. TAYLOR.

(In Chancery, 1855, 3 Drewry 183.)

THE VICE-CHANCELLOR. . . . It is difficult to lay down any fixed rule which goes to mark out the line between those cases when an account must be taken in equity, and when it need not. An attempt has been made to lay down such a rule, by saying the accounts must be mutual, that there must be receipts and payments on both sides. Now, even if that were the rule, this case does not contain any allegation of any receipts by the Plaintiff. But it really appears to me that it would be dangerous to lay down the rule in any such terms. For, take the common case of any gentleman of fortune keeping a mere money account, not a business account, with his banker; he pays money to the banker, and the banker pays his cheques; that is mutual receipt and payment; the banker receives money from the customer, and pays cheques to the customer; and the customer pays money into the banker's, and draws money out. If the rule were as stated, such a case would fall within it, while it is clear in such a case no bill would lie. It is therefore dangerous to say the equity depends on mutual receipts and payments; the equity must depend, in each case, on the nature of the account; it depends on this, whether the account is in its

own nature, not merely from number of items, but from its nature, so complicated that this Court will say, such an account cannot be taken in a Court of Law. That is not this case; the main if not the only question, is the claim of £1,175 for remuneration, and that is not a question of account so complicated that it can be said that a Court of Law cannot deal with it. The motion must therefore be refused with costs.

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## MUSGRAVE v. DICKSON.

(Supreme Court of Pennsylvania, 1896, 172 Pa. 629, 33 Atl. 705.)

Fell, J. This proceeding is founded upon a petition by Samuel Musgrave, one of the sureties on a replevin bond, for subrogation to the rights of the plaintiff in the judgment. An answer was filed by the appellant, the plaintiff, in which he averred that the judgment had not been fully paid, and in which he stated other supposed equitable grounds in denial of the right claimed. A separate answer was filed by the defendants, in which they alleged that they had transferred their property and business to the co-surety, J. C. Dicken, to secure him and Samuel Musgrave from any loss they might sustain by reason of the bond, and that from the management of their business an amount had been realized by Dicken more than sufficient to cover the payment made by Musgrave. It was agreed by both sureties that the amount due the defendants from the management of the business should be credited by Musgrave on account of the money which he had paid. . . .

Subrogation rests upon purely equitable grounds, and it will not be enforced against superior equities. Unless the surety pays the debt in full he is not entitled to subrogation, and until this is done the creditor will be left in full possession and control of the debt and the remedies for its enforcement. . . . The settlement of the account between the sureties and the defendant fixed the amount of the liability of the latter and the extent of the right to indemnity, but it did not affect the right of surogation, which will never be allowed to the prejudice and injury of the creditor. . . .

## PEIRCE v. GARRETT.

(Appellate Courts of Illinois, 1896, 65 Ill. App. 682.)

HARKER, J. This is an appeal from an order of the Circuit Court sustaining a demurrer to a bill in equity presented by appellants and dismissing it for want of equity at their costs.

The bill shows that on the 20th of July, 1893, John M. Boyer, being indebted to the Third National Bank of Bloomington, Illinois, with S. S. Porter, G. A. Griggs, John Niccolls and E. A. Vencill, as sureties for the Home Nursery Company in the sum of $8,400, as evidenced by a promissory note executed by them, June 12, 1893, executed and delivered to the bank a mortgage upon 185 acres of land in Whiteside county for the purpose of securing its payment; that the mortgage was given subject to a prior one for $2,000 to the Anthony Loan and Trust Company; that Griggs, Niccolls and Vencill are insolvent; that on January 22, 1894, judgment was entered upon the note, for $9,110.66; that Porter paid the judgment in full; that Porter assigned his right to subrogation as co-surety to complainants and procured the bank to assign the judgment and mortgages to complainants for a consideration of $2,000, and that Boyer, on the 9th of June, 1894, and long after the mortgage to the bank was placed upon record, conveyed the land to J. S. Garrett. The bill asks for a decree in favor of complainants to the extent of the right of Porter and the bank, for an accounting to ascertain what is due complainants and for an order of sale of the mortgaged premises, all subject to the rights of the Anthony Loan and Trust Company.

The demurrer is by Garrett and wife.

We entertain no doubt upon the proposition that Porter was subrogated to all the security of the bank against Boyer. The doctrine is well established that a surety who pays the debt of his principal will be subrogated to all the securities and equities held by the creditors against the principal. 1 Story's Equity Jurisprudence, sec. 499; 2 Brandt, on Suretyship, 479; Phares v. Barbour, 49 Ill. 370; Rice et al. v. Rice et al., 108 Ill. 199; Lochenmeyer v. Forgarty, 112 Ill. 572.

So firmly committed is our Supreme Court to that doctrine that it has been held the creditor can not release the security which it holds,

to the prejudice of the surety. City National Bank of Ottawa et al. v. Dudgeon et al; 65 Ill. 11.

Upon the same principle a surety who pays the debt for which he and a co-surety are liable will be subrogated to the rights of the creditor against the co-surety upon securities given by him to the extent of his right to compel contribution from the co-surety.

The fact that the debt was charged to a judgment before it was paid does not affect Porter's right of subrogation. Where a mortgage is given to secure a debt, and a debt becomes merged in a judgment, the mortgage stands as security for the judgment. Wayman et ux. v. Cochrane, 35 Ill. 151; Dacit v. Bates et al., 95 Ill. 493. Satisfaction of the judgment by a surety paying it would undoubtedly entitle such surety to an action on the mortgage.

The most serious question in the case is whether Porter's right of subrogation is assignable. Whether the collateral security to which a surety becomes subrogated by reason of paying the debts can be assigned so as to enable the assignee to maintain a suit, is a question which has never been presented to the courts of last resort in this State, so far as we are advised. It has been so held in Indiana. Numford v. Frith, 68 Ind. 83; Frank v. Taylor, 130 Ind., 145. In Harris on Subrogation, Sec. 199 the author, after stating that the surety is entitled to subrogation in a court of equity whether there has been an actual assignment of the collateral to him or not, says:

"Not only is this true, but the surety so paying the debt of his principal, and thus acquiring the right of subrogation, may assign over to any one his demand and equitable claim against the principal, and his assigns will be subrogated to the rights of the creditor, and may take his place, with all the securities, rights, remedies, privileges and priorities."

To us it seems consonant with reason that if the satisfaction of the judgment by Porter left the mortgage still alive, with the right in him to foreclose to the extent of his right to compel Boyer to then contribute, Porter could assign to appellants for a valuable consideration, and they would thereby be subrogated to all the rights of the Third National Bank and Porter in the mortgage. . . .

## DAVIES v. HUMPHREYS.

(In the Exchequer, 1840, 6 M. & W. 153.)

Parke, B. In these cases actions were brought by the plaintiff, one of the makers of a joint and several promissory note, dated the 27th of December, 1827, for the sum of £300, with interest, to recover from the two other makers, Evan Humphreys, and John Humphreys, a part of the money paid by him to the payee, he having paid the whole. In the action against Evan Humphreys, the plaintiff claimed the whole, alleging that the defendant was the principal debtor. Against the defendant John Humphreys, he claimed a moiety of what he had paid, alleging that the defendant was a co-surety. There were two pleas,—non assumpsit, and the Statute of Limitations; and on the trial at the Spring Assizes, before my Brother Coleridge, it appeared that the plaintiff had paid the whole of the debt and interest, of which the sum of £30 pounds only was paid within six years before the commencement of the suit, the residue having been discharged before. For this sum the plaintiff recovered against Evan Humphreys, leave being reserved by the learned Judge to move to increase the amount to the whole sum paid; against John Humphreys, the plaintiff recovered a moiety of £30, and permission was also given to move to increase that verdict. . . .

On the other hand, the rule for increasing the amount of the verdict against Evan Humphreys, the principal, must also be discharged; for it is clear that each sum the plaintiff, the surety, paid, was paid in ease of the principal, and ought to have been paid in the first instance by him, and that the plaintiff had a right of action against him the instant he paid it, for so much money paid to his use. However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement. The consequence is, that the plaintiff's right of action against the principal must be limited to the full amount of all the payments within six years, and this being the amount for which the verdict was taken, the rule to enter a verdict for a larger sum must be discharged. Against the co-surety the case is different—the Court will give it further consideration.

And now, in this Term, the judgment of the Court, on the remaining point in the action against John Humphreys, the surety, was delivered by

PARKE, B. This was an action by the plaintiff against the defendant, his co-surety on a promissory note, dated the 27th of October, 1827, for the sum of £300, with interest, to recover a moiety of the whole amount which he had paid to the payee. A rule granted in this case, as well as one which was granted in another action on the same note against the principal, was argued in the Sittings after Trinity Term. In the course of the last Term, the Court. . . . reserved for further consideration the question, at what time the right of one co-surety to sue the other for contribution arises.

This right is founded not originally upon contract, but upon principle of equity, though it is now established to be the foundation of an action, as appears by the cases of Cowell v. Edwards (2 B. & P. 269,) and Craythorne v. Swinburne (14 Ves. 164) ; though Lord Eldon has, and not without reason, intimated some regret that the Courts of law have assumed a jurisdiction on this subject, on account of the difficulties in doing full justice between the parties. What then is the nature of the equity upon which the right of action depends? Is it that when one surety has paid any part of the debt, he shall have a right to call on his co-surety or co-sureties to bear a proportion of the burthen, or that, when he has paid more than his share, he shall have a right to be reimbursed whatever he has paid beyond it? or must the whole of the debt be paid by him or some one liable, before he has a right to sue for contribution at all? We are not without authority on this subject, and it is in favor of the second of these propositions. Lord Eldon, in the case of Ex parte Gifford (6 Ves. 805), states, that sureties stand with regard to each other in a relation which gives rise to this right amongst others, *that if one pays more than his proportion,* there shall be a contribution for a proportion of the excess beyond the proportion which, in all events, he is to pay; and he expressly says, "that unless one surety should pay more than his moiety, he would not pay enough to bring an assumpsit against the other." And this appears to us to be very reasonable; for, if a surety pays a part of the debt only, and less than his moiety, he cannot be entitled to call on his co-surety, who might himself subsequently pay an equal or greater portion of the debt; in the former of which cases, such co-surety would have no contribution to pay, and in the latter he would

have one to receive. In truth, therefore, until the one has paid more than his proportion, either of the whole debt, or of that part of the debt which remains unpaid by the principal, it is not clear that he ever will be entitled to demand anything from the other; and before that, he has no equity to receive a contribution, and consequently no right of action, which is founded on the equity to receive it. Thus, if the surety, more than six years before the action, has paid a portion of the debt, and the principal has paid the residue within six years, the Statute of Limitations will not run from the payment by the surety, but from the payment of the residue by the principal, for until the latter date it does not appear that the surety has paid more than his share. The practical advantage of the rule above stated is considerable, as it would tend to multiplicity of suits, and to a great inconvenience, if each surety might sue all the others for a ratable proportion of what he had paid, the instant he had paid any part of the debt. But, whenever it appears that one has paid more than his proportion of what the sureties can ever be called upon to pay, then, and not till then, it is also clear that such part ought to be repaid by the others, and the action will lie for it. It might, indeed, be more convenient to require that the whole amount should be settled before the sureties should be permitted to call upon each other, in order to prevent multiplicity of suits; indeed, convenience seems to require that Courts of equity alone should deal with the subject; but the right of action having been once established, it seems clear that when a surety has paid more than his share, every such payment ought to be reimbursed by those who have not paid theirs, in order to place him on the same footing. If we adopt this rule, the result will be, that here, the whole of what the plaintiff has paid within six years will be recoverable against the defendant, as the plaintiff had paid more than his moiety in the year 1831; and consequently the rule must be absolute to increase the amount of the verdict from £15 to £30.

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## ACHESON v. MILLER.

(Supreme Court of Ohio, 1853, 2 O. St. 203.)

CALDWELL, J. This suit in the court below was one for contribution. The plaintiff in the action and the defendant, with four other

were the sureties for Garry Lewis on a draft for $5,000. Lewis became insolvent, and judgment was rendered against all the indorsers, and also a judgment against Lewis, the principal. Execution was issued, and four of the indorsers, of whom Reuel Miller was one, having indemnified the sheriff, directed him to levy on a store of goods recently the property and in the possession of Garry Lewis, the principal debtor, but which goods were assigned about that time to Daniel Gilbert. Gilbert brought suit against the sheriff and the four indorsers that directed him to levy, and recovered a judgment for the sum of $5,354.61, the value of the goods; which judgment was paid off by these four indorsers. Miller paid the one-fourth of it. The goods were sold by the sheriff and applied on the judgment, and paid on it $3,135.73. Acheson not having anything to do with the levy on the goods, has paid nothing, and this suit was brought by Miller against Acheson to require him to contribute his share of the $3,135.73 paid on the judgment by the sale of the goods.

On the trial in the court of common pleas, after the plaintiff had given in his evidence and rested, the defendant moved for a non-suit, which the court refused and gave judgment for the plaintiff. The defendant presented a bill of exceptions setting forth the evidence, which was signed and made a part of the record.

The question presented on this record is, whether contribution can be had in such a case.

It is said, on the part of the plaintiff in error, that Miller and those who acted with him were wrong-doers—that they committed a trespass in having the goods levied on, and that therefore he is not entitled to contribution for the payment made by the proceeds of such goods.

The rule that no contribution lies between trespassers, we apprehend is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen, that persons may join in performing an act, which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them. In such case, if one of the parties who have done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury, should pay their proportion? The common understanding and justice of humanity

would say that it would be just and right that each of the parties to the transaction should pay his proportion of the damage done by their joint act; and we see no reason why the moral sense of a court should be shocked by such a result. And we think this view of the case is fully sustained by the cases cited by counsel for the defendant in error. In the case of Adamson v. Jarvis, 4 Bing. 66, in speaking on this subject, Best, C. J., says: "From the concluding part of Lord Kenyon's judgment in Merryweather v. Nixon, and from reason, justice, and sound policy, the rule that wrong-doers can not have redress or contribution against each other, is confined to cases where the person seeking redress must be presumed to have known that he was doing a wrong."

The same doctrine is distinctly laid down in the case of Betts v. Gibbons, 2 Ad. & El. 57. From these and other cases referred to, we think the reasonable and common-sense rule and the legal one are the same, viz: that when parties think they are doing a legal and proper act contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere. . . .

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## McCONNELL v. SCOTT.

(Supreme Court of Ohio, 1846, 15 O. 401.)

This is a case in chancery, reserved in the county of Morgan.

The bill is filed by the complainant, as a surety of the principal debtor, against him and others, in whose hands the principal debtor has credits. The bill states, that judgment at law has been rendered against both principal and surety; that the principal debtor is insolvent, and seeks the appropriation of the credits of the principal, in the hands of the debtors, to the satisfaction of the judgment against both him and the complainant, who is his surety. . . .

Wood, C. J. The question raised by counsel is, whether a court of equity will entertain jurisdiction in a case like this? It is insisted, in argument, that the complainant is without remedy in any form, until the actual advance of the money due from his principal. At law, the position is doubtless correct. An action to recover for money paid for another does not lie, unless payment is made and proved on the

trial; nor can the principal debtor be made liable at law for subjecting his surety to the peril of paying his debt, until the injury actually accrues by payment. This is all very true; but there is, nevertheless, a great variety of circumstances, where equity steps in, for the reason that the law affords no adequate redress, and prevents impending or threatened injury.

The surety, however, occupies ground peculiar to his own relation, and is favored in both legal and equitable tribunals. Numerous cases are cited by counsel, where principles analogous to those sought to be applied here have been recognized in equity; and we think the complainant is within the authority of such adjudication. Indeed, in 1 Ohio, 533, the precise question now raised received the sanction of this court, and, in our view, the authority of that case should not be shaken.

What are the obligations of the principal debtor to his surety? Certainly to save him harmless from every injury which may result from such relation; and a promise is implied to this effect, as valid as if made in express terms, between the parties. 5 Cow. 596. There is no adequate remedy at law, when the principal debtor is insolvent, by which his effects and credits in the hands of others can be made to be applied for the benefit of the surety. Certainly not, as we have already said, without the surety first pays the debt. And such payment may be attended with great inconvenience and severe sacrifice of property—burdens which surely ought not to be imposed if they can, with propriety and justice, be avoided. In 6 Ves. 734, it is said "that equity will compel the principal to pay the debt, after due, at the instance of the surety." In 4 Def. 47, "that it would be hard on sureties, if they were compelled to wait till judgment against them, or they had paid the debt, before they could have recourse to their principal, who might waste his effects before their eyes." Other cases might be cited to the same import.

If, then, the principal debtor may be forced to pay the debt at the instance of the surety, it would seem to follow that the property, credits, or effects of such principal may be followed into the hands of others. It must not be understood that the judgment creditor can be delayed in his remedy against the surety. He has his judgment, and may take out his execution at pleasure; but if he has not collected his money of the surety, and the surety has made it out of the property or credits

of the principal, equity will decree its application in discharge of the creditor's judgment against the surety. Decree for complainant.

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## BROWN v. COZARD.

(Supreme Court of Illinois, 1873, 68 Ill. 178.)

SHELDON, J. The owner of a certain quarter section of land, in the south-west quarter of which he had a homestead right, having given a mortgage on the quarter section, in which he had released his homestead right, and there being a judgment against him which was a lien upon the quarter section, the judgment creditor brought this bill in equity against the mortgagee and the common debtor, to compel the former to resort first for the satisfaction of his mortgage to the south-west quarter of the quarter section, so that the judgment, with the residue of the mortgage debt, if any, might be satisfied out of the remaining portion of the land. A demurrer to the bill in the court below was sustained, and the bill dismissed. This is assigned for error.

In support of the bill, that principle of equity is invoked, that if one party has a lien on or interest in two funds for a debt, and another party has a lien on or interest in one only of the funds, for another debt, the latter party has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both parties, whenever it will not operate to the prejudice of the party entitled to the double fund. The question is, whether this is a case for the application of the principle. The mortgagee has an undoubted right to sell the homestead for the satisfaction of the mortgage; the judgment creditor has not that right, as respects the judgment. It will produce no injury to the mortgagee, to be compelled to resort first to the tract in which the homestead right exists, as respects the judgment, but has been released as respects the mortgage.

So far, the principle may apply; but the doctrine is attended with this qualification: that no injustice be done to the common debtor. 1 Story, Eq. Jur., sec. 642. The statute provides, that no release or waiver of the homestead exemption shall be valid, unless the same shall be in writing, subscribed by the householder and his wife, if he have one, and be acknowledged, etc.

The object sought by this suit is to make the release of the homestead exemption, which has been made to the mortgagee, operative for the benefit of a judgment creditor, to whom there has been no release of the homestead right in writing.

If the end sought should be attained, the judgment creditor will have derived the benefit of the release of the homestead exemption, not by virtue of a release of it, in writing, to himself, but by an order of the court. The waiver of the homestead exemption was in favor of the mortgagee, and might have been made in the personal confidence that he would first exhaust all the residue of the quarter section of land before resorting to the particular tract in which the homestead right existed, and in the belief that such residue would be sufficient to satisfy the mortgage, so that the homestead would remain untouched.

The mortgagee himself, of his own accord, may first resort, for the satisfaction of his mortgage, to the tract in which the homestead right exists as against the judgment; of this the mortgagor would have no cause to complain, because it would be in the exercise of a power which he himself had voluntarily bestowed upon the mortgagee. But when the mortgagee, not by his own voluntary action, and for his own benefit, but at the instance and for the benefit of a judgment creditor, for the purpose of having his judgment satisfied, is compelled to resort first for the satisfaction of his mortgage to the tract subject to the homestead exemption as respects the judgment, the mortgagor then would seem to have just cause of complaint, that his homestead had been taken from him in a mode and for the benefit of a creditor, not contemplated by the statute, and whereto he had never given his assent.

This would be in violation of the intent of the statute, that the homestead right should not be injuriously affected for debt, without the express assent, in writing, of the debtor.

The purpose of the statute is a benign one; to secure to the debtor and his family a home, sacred from sale for debt, save by the freely given assent of himself and his wife, in writing.

And we think a court of equity should act in the exercise of the power which is invoked in the present instance, so far as may be, in such a way as to advance and not to thwart the policy of the statute.

Being of opinion that the relief sought would be in contravention of the spirit and policy of the homestead act, and to the injury of the

common debtor, we think the demurrer was properly sustained and the bill rightly dismissed.

The decree is affirmed.

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## WADSWORTH v. SCHISSELBAUER.

(Supreme Court of Minnesota, 1884, 32 Minn. 84.)

MITCHELL, J. There are two classes of cases, both commonly called creditors' suits, which, although closely allied, are clearly distinguishable. The first, a creditor's suit strictly so-called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor, which could not be reached on execution. The general rule is that such an action cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution and its return unsatisfied. This was required because equity would not aid the creditor to collect his debt until the legal assets were exhausted, for, until this was done, he might have an adequate remedy at law. The execution had to be issued to the county *where the debtor resided*, if a resident of the state. Its issue to another county would not suffice. Reed v. Wheaton, 7 Paige, 663. The second class of cases is where property legally liable to execution has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance or incumbrance as an obstruction to the enforcement of his lien; for, though the property might be sold on execution notwithstanding the fraudulent conveyance, the creditor will not be required to sell a doubtful or obstructed title. In the latter class of cases, the prevailing doctrine is that it is not necessary to allege that an execution has been returned unsatisfied, or that the debtor has no other property out of which the judgment can be satisfied; for that is not the ground upon which the court of equity assumes to grant relief in such cases, but upon the theory that the fraudulent conveyance is an obstruction which prevents the creditor's lien from being efficiently enforced upon the property. As to him the conveyance is void, and he has a right to have himself placed in the same position as if it had never been made. The fact that other property has been retained by the debtor may be evidence that the conveyance is not fraudulent; but if

the grantee's title be tainted with fraud, he has no right to say that all other means to satisfy the debt shall be exhausted before he shall be disturbed. Botsford v. Beers, 11 Conn. 369; Weightman v. Hatch, 17 Ill. 281; Vasser v. Henderson, 40 Miss. 519.

There is much conflict of authority as to how far the creditor must first proceed at law. It has been held in some cases that if an execution has not been returned unsatisfied, an execution must be issued and the action brought in aid of an execution then outstanding. Such seems to be the latest view of the courts of New York, after much vacillation and conflict of decision. Adsit v. Butler, 87 N. Y. 585. But the prevailing and, as we think, on principle, the better rule is that the creditor need only proceed at law far enough to acquire a lien upon the property sought to be reached before filing his bill to set aside a fraudulent conveyance. The extent to which he must proceed to do this will depend on the nature of the property. If it be personal, there must be a levy, for until this is made he has no lien. If it be real estate, it is enough to obtain judgment, and docket it in the county where the lands are situated. I Am. Lead. Cas. 54, 55; 2 Barb. Ch. Pr. 160; Bump on Fraudulent Conveyances, 523; Weightman v. Hatch, supra; Newman v. Willetts, 52 Ill. 98; Vasser v. Henderson, supra; Dodge v. Griswold, 8 N. H. 425; Tappan v. Evans, 11 N. H. 311; Cornell v. Radway, 22 Wis. 260; Clarkson v. De Peyster, 3 Paige, 320; Dunham v. Cox, 10 N. J. Eq. 437-466. The lien on the land, and the right to sell it in satisfaction of the debt, is the basis of the right to have the deed set aside.

This was a suit to set aside a fraudulent conveyance of real estate executed by the judgment debtor, and hence falls within the second class. It follows from what has been said that it was not necessary to issue an execution at all before commencing the present action. Hence it is wholly immaterial that it does not appear that it was directed to the county where the debtor resided. In our view the complainant is good. Order reversed.

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## McCLURG v. PHILLIPS.

(Supreme Court of Missouri, 1872, 49 Mo. 315.)

Bliss, J. The plaintiff filed his petition to foreclose a mortgage, but the instrument not having been sealed, he sets out that the parties

intended that it should have been sealed, and that the omission to do so was a mistake; and he asks to have it reformed, and then that the land be sold for the payment of the debt. Defendant Phillips was the mortgagee and fails to appear. Defendant Paul, who is charged as purchaser with notice, demurs to the petition because the facts stated do not constitute a cause of action. The demurrer was sustained, and plaintiff appeals. . . .

But it was not necessary to seek the reformation of the instrument. If the mortgagee desired its correction merely, without seeking to enforce it, in order to make it a perfect mortgage conveying the legal title, or if he desired to put it in a condition for a proceeding under the statute, then it would be necessary to prove the mistake and obtain an order to correct it. But without any such correction it is a good equitable mortgage, and can be enforced by an action analogous to a chancery proceedings. Before the adoption of the code, a proceeding under the statute was held to be an action at law, and was not governed by rules in chancery. (Carr v. Holbrook, 1 Mo. 240; Thayer v. Campbell, 9 Mo. 277; Riley's Adm'r v. McDook's Adm'r, 24 Mo. 265; Fithian v. Monks, 43 Mo. 502.) The last two cases arose since the adoption of the code, and the same distinction is taken between a statutory foreclosure and a proceeding under the general power of courts of equity in mortgages and liens. To enable one to foreclose under this statute and obtain a general judgment and execution for any balance that may remain due after sale of the mortgaged premises, the mortgage must be regular; but if it be irregular, as by the omission of any requisite to a complete instrument still it is held to create a lien—a trust for the benefit of the creditor—which can be enforced in equity. . . .

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## ATKINS v. CHILSON.

(Supreme Court of Massachusetts, 1846, 52 Mass. 112.)

Wilde, J. This was a writ of entry to recover possession of a lot of land, formerly leased by the demandant to the tenant for a term of years not yet expired.

The action is founded on an alleged breach of a condition in the lease, by the non-payment of rent, and a clause of entry thereupon reserved by the demandant in the lease. The tenant, protesting that

no forfeiture had accrued, moved the court, at the trial, to stay all further procedings in the case, on his paying the rent and costs. This motion was sustained by the chief justice, who presided at the trial, and the questions now are, whether a court of common law has power to grant the relief prayed for, and if so, whether it ought to be granted on the facts reported. . . .

That a court of equity would grant relief in a case like this is not questioned, and cannot be denied. The true foundation of equitable relief, in cases of penalties and forfeitures, is limited to such cases as admit of compensation according to the original intent of the parties. And in all cases where the penalty of forfeiture is desired to secure the payment of a certain sum of money, a court of equity will grant relief, on payment of the money secured, with interest; as in case of penalties or forfeitures for the non-payment of rent, and other similar cases. 2 Story on Eq. secs. 1315, 1320; Sanders v. Pope, 12 Ves. 282; Baxter v. Lansing, 7 Paige, 350. It is, however, denied that courts of common law have any such power. But the authorities cited by the counsel for the tenant abundantly show that in many cases, and for a long period of time, the courts of common law in England have exercised such a power, by granting relief in support of equitable defences, "for the easier, speedier and better advancement of justice," without turning the party over to a court of equity. A fortiori ought this to be done in cases where courts of equity have no jurisdiction, by reason of the limitation of their powers. The ancient common law, as known and administered before the days of Bracton, has been much improved and enriched by the introduction of many principles of the civil law, and by rules of practice founded on justice and equity, and by the labors and investigations of learned judges and jurists, who have laid down the just rules and principles by which the courts of common law are to be governed, at the present day, in the administration of justice.

At the present time, and long before our separation from the government of England, courts of common law and courts of equity have and had concurrent jurisdiction in many cases; such as cases of fraud, nuisance, waste, and many other cases; although the theory is, that courts of equity will not interpose and sustain a bill for relief, where there is an adequate remedy at law—courts of equity having been originally established for the purpose of supplying the defects, and correcting the rigors or injustice of the common law, so that

justice may be distributed and enforced in the most perfect manner, secundum aequum et bonum. Courts of law, therefore, are bound to administer justice, where they may consistently with the principles and rules of the common law, and not to compel parties to resort to courts of equity to obtain relief. They will stay proceedings, when thereby full justice may be done, and in cases where a court of equity would enjoin the plaintiff not to prosecute his action at law. Thus unnecessary expense and delay are avoided, and no injustice is done. On this ground courts of common law interpose in support of an equitable defence. . . .

We have no doubt, therefore, of the power of this court to stay proceedings in support of an equitable defence. And if we have such power, that it ought to be exercised in this case, no one, we think, can doubt. We cannot imagine a more unjust and oppressive claim, than that which the demandant attempts to enforce. By mistake, the tenant, as it was said on the argument and not denied, tendered a quarter's rent a day or two before it was due; but this was no prejudice to the demandant. And it is quite certain that the rent would not have been received, if it had been tendered on the day when it was payable; for the demandant, as his counsel admits, (and as we know judicially,) had then an action pending for the supposed breach of another condition of the lease, for which he claimed the forfeiture. See Atkins v. Chilson, 9 Met. 52. The demandant, therefore, could not have accepted rent without defeating his action, as such an acceptance would amount to a waiver of the forfeiture.

We are therefore of opinion that the rule adopted at the trial should be made absolute, with some enlargement, however, of the terms. We think the tenant is bound to pay all the rent now in arrear, with interest; for although the demandant has no legal right to interest, (it being admitted that all the rent, except for one quarter, has been duly tendered to him,) yet he has an equitable claim, as the tenant, no doubt, has had the use of the money. For he must have known that the money would not be demanded of him; and the presumption is that it was used by him.

The sum due to the demandant being ascertained according to this modification of the rule, the further proceedings in the case are to be stayed, on payment of the sum due, with costs, or by bringing the same into court for the demandant's acceptance. (See St. 1847, c. 267, sec. 1.)

## WIERICH v. DE ZOYA.

(Supreme Court of Illinois, 1845, 7 Ill. 385.)

CATON, J. The bill shows, that the complainant was served with a garnishee process in an attachment suit, in which the present defendants were plaintiffs and one McCormick was defendant, in which a judgment was perfected against the present complainant as a debtor of McCormick, to whom in fact he was not indebted, and that he might have successfully defended himself against the said proceedings, had he attended and made defence. The reason assigned in the bill for not attending to the suit is, that after the issuing of the sci. fa., which was sued out on the conditional judgment, and before the return day of the sci. fa., Wierich was directed by Byers, one of the plaintiffs in the attachment, to pay the demand which they were pursuing by their attachment to one Sherrill, to whom he was satisfied it was due instead of McCormick, and that he would dismiss the garnishee proceedings against them and pay the costs. Relying upon this assurance of Byers, the garnishee paid no further attention to the matter, but that in violation of that arrangement, the plaintiffs in the attachment suit fraudulently proceeded and perfected their judgment against the garnishee, and threaten to collect the same; that according to the direction of Byers, the complainant had paid the demand to Sherrill. The bill prays a perpetual injunction. A demurrer was sustained to the bill, and the bill dismissed.

The only question to be determined is, whether the bill shows sufficient upon its face to entitle the party to the injunction. We are clearly of the opinion that it does. The demurrer admits the truth of the statements in the bill, and they present a clear case of fraud. The defendants have taken advantage of their own wrong in obtaining the judgment at law. I hardly know where we are to look for a stronger case. After the proceeding had been commenced against the complainant, Byers, one of the plaintiffs in that suit, investigated the title to the note, the amount of which they were seeking to recover, and being convinced that it belonged to Sherrill, advised Wierich to pay it to him, which was accordingly done. At the same time, also, he assured him that he would dismiss the garnishee proceedings against him, and pay the costs. If this were not sufficient to justify Wierich in paying no further attention to that proceeding, it is not for the party, who,

by fair promises, induced him to attend no further to the proceeding by assurances that it should be dismissed, to accuse him of negligence. If the complainant was too confiding, it is not for the party who has betrayed that confidence to reproach him with, or take advantage of it. He lulled the present party into security, by assurances that he would do what it was but just that he should have done, and then, in his absence, and in violation of his agreement, took a judgment to which he knew he was not entitled; and then, when called upon to release it, said that he had made over his interest to his co-plaintiff in that suit, and hence he could do nothing about it. De Zoya, when called upon for the same purpose, excuses himself for insisting upon payment of the judgment, by saying he knows nothing about it. If he did not participate in the original fraud, by insisting upon its fruits he becomes a party to it. He cannot excuse himself as being a bona fide purchaser of the interest of his co-plaintiff, who actually committed the fraud. It having been committed by one of the parties to the judgment, it is as much tainted as if all the parties had participated in the fraudulent practices and design.

Where a judgment is obtained by fraud or accident, without any fault or negligence on the part of defendant, a Court of Equity will afford relief, either by opening the case, and allowing the party an opportunity of another trial, or by a perpetual injunction. (Buckmaster v. Grundy, 3 Gil. R. 631; Owens v. Ranstead, 22 Ill. R. 168.) In case a new trial is awarded, whether it should be sent back to the Court of Law to be tried again, as seems to be the practice in Kentucky, or whether the Court of Chancery will proceed, having thus obtained jurisdiction of it, and make such a disposition as the real rights of the parties require, we do not now propose to determine. In this case that question does not arise, for here is a clear case presented in the bill, requiring a perpetual injunction. . . .

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## HAMILTON v. McLEAN.

(Supreme Court of Missouri, 1897, 139 Mo. 678, 41 S. W. 224.)

Burgess, J. This is a proceeding in equity by which plaintiff seeks to set aside a decree of partition, rendered by the circuit court of Buchanan county in pursuance of mandate of the Supreme Court.

The petition, leaving off the formal parts, is as follows: . . .

Whatever the rule may be elsewhere, it is well settled in this State in order that a judgment may be made set aside for fraud in a direct proceeding for that purpose it must be made to appear that fraud was practiced in the *very act* of obtaining the judgment. Lewis v. Williams, Adm'r. of Henry, 54 Mo. 200.

Payne v. O'Shea, 84 Mo. 129, was a bill in equity to enjoin and restrain the enforcement of a judgment obtained before a justice of the peace and asking for a settlement and accounting between the parties, and it was held that while a judgment may be set aside in equity for fraud, the fraud must be in the procurement of the judgment, and not merely fraud in the cause of action on which the judgment is founded, and which could have been interposed as a defense, unless its interposition as a defense was prevented by the fraud of the adverse party. That case was followed and approved in Murphy v. DeFrance, 101 Mo. 151, in which is quoted with approval the following from Freeman on Judg. (3 Ed.), sec. 489: "The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment. If the cause of action be vitiated by fraud, this is a defense which must be interposed, and unless its interposition be prevented by fraud, it cannot be asserted against the judgment." The court also said "courts of equity do not grant such relief for the purpose of giving a defeated party a second opportunity to be heard on the merits of his defense; and the relief is confined to those cases where the judgment is procured by fraud or through excusable mistake or unavoidable accident." See, also, Murphy v. DeFrance, 105 Mo. 53; Oxley Stave Co. v. Butler Co., 121 Mo. 614.

The same question was before the Supreme Court again in Nichols v. Stevens, 123 Mo. 96, and it was held that in order that a judgment may be set aside upon the ground of its having been obtained by fraud it must appear that the judgment was "*concocted* in fraud; that fraud was practiced in the *very act* of obtaining the judgment. The fraud in such case must be *actual* fraud as contradistinguished from a judgment obtained on false evidence or a forged instrument on the trial." See, also, Moody v. Peyton, 135 Mo. 482; 1 Bigelow on Fraud, pp. 86, 87; Ward v. Southfield, 102 N. Y. 287.

"The docrtine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented

and considered in the judgment assailed." . . . That the mischief of re-trying every case in which the judgment or decree rendered on false testimony, given by perjured witness, or on contracts or documents whose genuiness or validity was in issue, and which are afterward ascertained to be forged was in issue, and which are afterward ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." United States v. Throckmorton, 98 U. S. 61. In that case there is also quoted with approval the following from Wells on Res Adjudicata, sec. 499. "Fraud vitiates everything, and a judgment equally with a contract, that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. . . . Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance beside the negligence of the defendant, in preventing the defense in the legal action.

While the petition shows that the deed in question was assailed by plaintiff in the partition suit on the ground of its having been obtained by Mrs. McLean and Mrs. Bates by fraud and that that question was decided adversely to him, he now undertakes by this action to escape the legal consequence flowing from the result of that adjudication, by averring that the deed was a forgery, which defendants knew, and which he did not learn until the determination of that suit when his suspicions were aroused by the statements made by Mrs. Bates whose deposition was being taken in another suit. It thus appears that plaintiff was afforded an opportunity of showing that the deed was a forgery upon the trial of the partititon suit, and having failed to do so without interposition on the part of the defendants herein, he is not entitled to have the judgment in that case set aside merely to give him a second opportunity to show that the deed was a forgery. . . .

## COWLS v. COWLS.

(Supreme Court of Illinois, 1846, 8 Ill. 435.)

Caton, J. This bill was filed by Ann Cowls against her late husband for the purpose of obtaining the custody of their children, and a reasonable allowance for their support. In a former suit between the same parties, Mrs. Cowls had obtained a divorce from the present plaintiff, but in that decree no provision was made in relation to the children. There were two children living at the time the decree was entered, Mary Jane, aged six and Thomas, aged four years. The reasons assigned in the bill why they should not longer be allowed to remain with their father, and which are not denied by him, but are admitted by his demurrer, are, that since the time when the divorce was granted, he had lived in a state of fornication with a woman, until within a few weeks of the time when this bill was filed, when he married her. That she was a woman of notoriously bad character, and not in any way qualified for the care and education of the children. That they are now left entirely under her care, and the influence of her bad example. That he neglects them and is addicted to excessive and frequent intoxication. That he is in the habit of quarreling with his present wife, in the presence of the children and driving her from the house. That he is in the habitual use of profane, indecent, immoral and vulgar language, as well in the presence of the children as elsewhere. For these reasons the court decreed that the children should be taken from the father, and placed in the custody of the mother, and the court also allowed for their support thirty dollars per annum each, for the period of five years, to be paid by the defendant.

The power of the court of Chancery to interfere with and control, not only the estates but the persons and custody of all minors within the limits of its jurisdiction, is of very ancient origin, and cannot now be questioned. This is a power which must necessarily exist somewhere, in every well regulated society, and more especially in a republican government, where each man should be reared and educated under such influences that he may be qualified to exercise the rights of a freeman and take part in the government of the country. It is a duty, then, which the country owes as well to itself, as to the infant, to see that he is not abused, defrauded or neglected, and the infant has

a right to this protection. While a father so conducts himself as not to violate this right, the court will not ordinarily interfere with his parental control. If, however, by his neglect or his abuse, he shows himself devoid of that affection, which is supposed to qualify him better than any other to take charge of his own offspring, the court may interfere, and take the infant under its own charge, and remove it from the control of the parent, and place it in the custody of a proper person to act as guardian, who may be a stranger. . . .

Infants thus taken under the charge of the court of Chancery for the protection of their persons and property, are called wards of the court, and the guardian, or person appointed by the court to act as guardian, is an officer of the court and is entirely under its direction and control, and entitled to its aid in enforcing a proper obedience and submission on the part of the ward, and to prevent the improper interference of third persons. A jurisdiction thus extensive, and liable as we have seen, to enter into the domestic relations of every family in the community, is necessarily of a very delicate, and often of a very embarrassing nature; and yet its exercise is indispensable in every well governed society. It is indispensably necessary to protect the persons and preserve the property of those who are unable to protect and take care of themselves.

It becomes clear, then, that our Legislature, by providing that "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just," has conferred no new authority or jurisdiction upon the court. It was by its original jurisdiction clothed with the same powers before.

The cases provided for in this statute are necessarily embraced in that broad and comprehensive jurisdiction with which the Court of Chancery is vested, over the persons and estates of infants and their parents who are bound for their maintenance. To apply these principles to the case before us. What are its circumstances? After a divorce had been decreed between the parties, without making any provision as to the care, custody, or maintenance of the children, the mother files a bill, and asks that the custody of the children shall be taken from the father for the reasons, that he has for some time been living with a prostitute, whom he has finally married, and that

the children, who are of tender age, are left principally under her control, and pernicious example and influence; that he is very intemperate in his habits, profane, and is in the habit of using vulgar and obscene language in the presence of his family and these children. Here we have grouped together into one disgusting and revolting picture, those features of a father's character who has become unworthy of the charge of his own offspring, and any one of which, as we have seen it laid down by Mr. Justice Story, will authorize the court in its discretion, to interfere and remove the child without the influence of such a polluted atmosphere. Under such circumstances, if these children are allowed to remain with their father, it is impossible to expect that they will be properly reared and educated. It would be too much to hope that they will not be affected and polluted by the pernicious examples constantly before them. We cannot doubt but a due regard for the well being of these children requires the court to take them under its own care and control. . . .

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## GORMAN v. MULLINS.

(Supreme Court of Illinois, 1898, 172 Ill. 349, 50 N. E. 222.)

Craig, J. The only question involved in this case is, did the Superior Court, under the evidence, have power to authorize a sale of the real estate described in the bill of complaint, held in trust for the minors, Robert Gorman and Mary Mullins, and the re-investment of the proceeds?

The prevailing doctrine in England appears to be, that courts of equity have no power, by virtue of their general jurisdiction over minors, to order the sale of a minor's real estate for the purpose of education, maintenance or investment; but many of the courts of this country have refused to follow the English rule, and have held "that where it is for the benefit of the minor, courts of equity have the power, by virtue of their general jurisdiction over the estates of minors and others under disability, to authorize a change from real to personal and from personal to real." (Huger v. Huger, 3 Dessaus. 18; In re Salsbury, 3 Johns. Ch. 347). In Snowhill v. Snowhill, 3 N. J. Eq. 20, the court said: "Courts of equity may, and not infrequently do, change the character of property. They will permit trustees or guar-

dians to do it when it is manifestly for the advantage of the infant. They will convert the property of a lunatic from real into personal for his interest,—and this has frequently been done without reference to the contingent interests of real or personal representatives." In Smith v. Sackett, 5 Gilm. 534, this court said (p. 545): "The jurisdiction of the court of chancery to order the sale of the whole or a portion of the estate of an infant, or to order it to be encumbered by mortgage, whenever the interest of the infant demands it, will not be denied, whether that interest be of a legal or an equitable nature." The authorities on this question were thoroughly reviewed in the case of Hale v. Hale, 146 Ill. 227, which involved large property interests. It was there said (p. 253): "We need therefore only add, that the power of courts of chancery, by virtue of their general jurisdiction over the estates of infants, to authorize the conversion of their real estate into personal, where it is clearly for their interest that such con-
rent of authority in this country, but is so thoroughly settled by the former decisions of this court as to be no longer an open question
version should be made, is not only supported by the general cur-
in this State." . . .

The decree finds, from the evidence, that the land is improved with several dwelling houses, which, at the time of the death of the testator, Dennis S. Mullins, were of the rental value of $250 per month, but which are now of no rental value whatever; that the part of the city of Chicago in which said land is situated has changed, since the death of the testator from a first-class residence district into a very poor residence district; that the value of said land has decreased greatly since testator's death, and is liable to decrease still more before said minors arrive at their majority; that said land is now of the fair cash value of $15,000, and that it is for the interest of all parties to the suit that said land be sold and its proceeds invested in interest-bearing securities; that under the terms of the will the title to said lands is vested in complainants, as trustees, in fee; that the only persons now interested in said trust are the respective complainants and defendants, and that it is for the best interest of all the parties thereto that said lands be sold and the proceeds derived from such sale be held in place of said lands and invested by the complainants, subject to the same trust upon which the lands are now held by them. The decree carefully protects the rights of the minors by requiring a bond, and the court reserves to itself the power to give further directions at any

time, for the proper accounting for such proceeds by said trustees. From the evidence recited in the decree it is apparent that the holding of the property will be disastrous to the minors, as it has decreased in value since the testator's death and is still decreasing in value, while it has no rental value whatever. After a careful examination of the evidence as recited in the decree we are satisfied that it is manifestly for the interest of the minors that the conversion of the property should be made, and that the Superior Court, in the exercise of its chancery jurisdiction, properly authorized the change to be made. . .

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## CARMICHAEL v. LATHROP.

(Supreme Court of Michigan, 1896, 108 Mich. 473, 66 N. W. 350.)

HOOKER, J. . . . The complainant files the bill in this cause, alleging that the lands conveyed by the testator to her two sisters should be treated as ademptions of their respective legacies, and that they should be required to account to her for her share thereof. She alleges that her father so intended, and that they recognized the justice thereof, and promised to see that she received the same, and relying upon such promises, she consented to the settlement of the estate, expecting that her sisters would pay her an amount equal to her share of said parcels so received by them. . . .

The case is one where it is claimed that a gift of personal property by will may be satisfied by a conveyance of land, when such is the clear intention of the testator.

If a person should bequeath to another a sum of money, and previous to his (the testator's) death, should pay to such person the same amount, upon the express understanding that it was to discharge the bequest, the legacy would be thereby adeemed. But, in the absence of an apparent or expressed intention, that would not ordinarily be the effect of the payment of a sum of money to a legatee under an existing will. Generally, such payment would not affect the legacy. To this rule there is an exception, where the testator is a parent of or stands to the legatee in loco parentis. In such case the payment would be presumed to be an ademption of the legacy. At first blush this impresses one as an unreasonable rule, as it puts the stranger legatee upon a better footing than the testator's own son, and judges and law-

writers have severely condemned the rule. See 2 Story, Eq. Jur. secs. 1110-1113. It has been said that "this rule has excited the regret and censure of more than one eminent modern judge, though it has met with approbation from other high authorities." 2 Williams, Ex'rs (7th Am. Ed.) *1194. Story's condemnation of it is strong, but he adds, "We must be content to declare, 'Ita lex scripta est.' It is established, although it may not be entirely approved." And Worden, J., in Weston v. Johnson, 48 Ind. 5, says, "Whatever may be thought of the doctrine, it is thoroughly established in English and American jurisprudence." . . .

There are cogent reasons in support of the rule stated,—i. e., that payment to a son adeems the legacy,—which is based on the theory that such legacy is to be considered as a portion, and that the father's natural inclination to treat his children alike renders it more probable that his payment was in the nature of an advancement than a discrimination in favor of one, oftentimes the least worthy. Double portions were considered inequitable, and upon this the doctrine rests. Suisse v. Lowther, 2 Hare, 424, 433.

While the authorities are a unit that a legacy by one in loco parentis will be adeemed by payment, in the absence of an apparent or expressed intent to the contrary, the doctrine was early restricted. Among other limitations was the rule that the presumption could not be applied to a residuary bequest, because the court would not presume that a legacy of a residue, or other indefinite amount, had been satisfied by an advancement, as the testator might be ignorant whether the benefit that he was conferring equaled that which he had already willed. Freemantle v. Bankes, 5 Ves. 85; Clendening v. Clymer, 17 Ind. 155; 2 Story, Eq. Jur. sec. 1115. This exception fell with the discarding of the rule that satisfaction must be in full. Pym v. Lockyer, 5 Mylne & C. 29; Montefiore v. Guedalla, 1 De Gex, F. & J. 93. Again it was held that it could not be applied unless the advancement was ejusdem generis with the legacy. See 2 Story Eq. Jur. sec. 1109.

There can be no doubt that a testator's conveyance of real property may constitute an ademption, if he so intends it, e. g., where he expresses the intent in the conveyance, and possibly in other ways. If so, the only significance of the doctrine ejusdem generis is its effect upon the presumption. The doctrine that the property conveyed must be ejusdem generis appears to be the only ground upon which

it can be said that the conveyance in this case should not be treated as satisfaction pro tanto. It has been said in early cases that "when the gift by will and the portion are not ejusdem generis, the *presumption will be repelled*. Thus, land will not be presumed to be intended as a satisfaction for money, nor money for land." Bellasis v. Uthwatt, 1 Atk. 428; Goodfellow v. Burchett, 2 Vern. 298; Ray v. Stanhope, 2 Ch. R. 159; Saville v. Saville, 2 Atk. 458; Grave v. Earl of Salisbury, 1 Brown, Ch. 425. But see Bengough v. Walker, 15 Ves. 507. The courts have not accepted without protest the proposition that the application of the presumption arising from the relation of parent and child should depend upon the similarity of the property willed and donated, and it has been asked "why, if a gift of a thousand dollars will satisfy a legacy of that amount, it should not equally be satisfied by a donation of lands of equal value." And see Pym v. Lockyer, 5 Mylne & C. 44. But all agree that ademption is a matter of intent. In Jones v. Mason 5 Rand. (Va.) 577, the court said, "This whole class of cases depends upon the intention;" citing Hoskins v. Hoskins, Prec. Ch. 263, and Chapman v. Salt, 2 Vern. 646. Again, it was said: "It is laid down generally that a residuary legacy will not adeem a portion due under a settlement, because it is entirely uncertain what that legacy may be. But this rule, like the rest, yields to intention;" citing Rickman v. Morgan, 1 Brown, Ch. 63, 2 Brown, Ch. 394. In Bengough v. Walker, 15 Ves. 507, it was held that a bequest of a share in powder works, charged with an annuity, was a satisfaction of a portion of 2,000 pounds, when it was so intended. See, also, Gill's Estate, Pars. Eq. Cas. 139. It is forcefully argued that these cases make obsolete the doctrine of ejusdem generis. Whether they do or not, they certainly show that it must yield to the testator's intent. We cannot, therefore, accede to the proposition of counsel for the defendants "that conveyance of real estate will not be held a satisfaction of any legacy, in whole or in part, even though the intent of the testator is clear." . . .

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## STRONG v. WILLIAMS.

(Supreme Court of Massachusetts, 1815, 12 Mass. 391.)

The plaintiff declared in debt upon a bond made to her by Woodbridge Little, Esquire, the defendant's testator, dated the 18th of

August, 1800, conditioned to pay her $200 within one month after her marriage, if such event should take place in the lifetime of the obligor, or that his heirs, executors, or administrators should pay her $333.33 within six months after his decease. . . .

On the 20th of March, 1813, the said testator made his last will, which was approved after his decease, and of which the defendant is executor; and, on the 21st of June following, the testator died, leaving neither wife nor issue. In the said will, the said testator, in consideration of the long, faithful, friendly, and meritorious services of the plaintiff, both to himself and his then late beloved wife, bequeathed to her his household furniture, with sundry other valuable chattels, $300 in cash, and also the use of his homestead for six months, or half the rents thereof for the first twelve months after his decease, at her election.

The specific articles so bequeathed were of the value of $745.84, and the rent of the said homestead for six months was equal to $50; all of which the plaintiff had received, together with the said cash legacy. The amount of the testator's estate and credits was $3346.66, and of the legacies, payable in money, $2200. All the residue of his estate, after payment of debts (which were of trifling amount), and legacies, he devised to the corporation of Williams College, under whose direction the defendant contended that the bond had been satisfied by the payment of the said legacies to the plaintiff.

If, in the opinion of the Court, the plaintiff was entitled to recover the sum due by the bond, in addition to the said legacies, judgment was to be rendered in her favor upon the default of the defendant otherwise, the plaintiff was to become nonsuit. . . .

PUTNAM, J. The general rule anciently established in chancery was, that, when a testator, being indebted, gave to his creditor a legacy equal to, or exceeding, the amount of his debt, the legacy should be considered as a satisfaction for the debt. The rule has been acknowledged in later cases, but with marks of disapprobation, and a disposition to restrain its operation in all cases where, from circumstances to be collected from the will, it might be inferred that the testator had a different intention. (Haynes v. Mico, 1 Bro. Cha. Ca. 131.) Thus, where a testator left a sufficient estate, it was determined that he was to be presumed to have been kind as well as just. So, if the legacy was of a less sum than the debt, or of a different nature, or upon conditions, or not equally beneficial in some one particular, although more so in another.

All the cases agree that the intention of the testator ought to prevail; and that, prima facie at least, whatever is given in a will is to be intended as a bounty. But, by later cases, the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstances of the case should lead to a different conclusion. . . .

But cases of this nature must depend upon the circumstances; and there must be a strong presumption, to induce a belief that the testator intended the legacy as a payment, and not as a bounty. (2 Fonbl. 332). Thus, where the testatrix had given her servant a bond for 20 pounds free of taxes for her life, and afterwards made her will and gave the servant 20 pounds per annum, payable half yearly, but said nothing about the taxes, the court held that both should be paid. (Atkinson v. Webb, 2 Vern. 478.) Here the legacy, being not quite so beneficial as the debt, did not raise a presumption that it was intended as a payment.

So, where the testator, having sufficient assets, and having manifested great kindness for the legatee, gave a legacy of a greater amount than he owed, it was holden by Lord Chancellor Cowper, that the testator might be presumed to be kind as well as just; and he decreed the payment of the legacy as well as the debt. (Cuthbert v. Peacock, 1 Salk. 153.) It has been holden, that a legacy for a less sum than the debt shall never be taken as satisfaction; (1 Salk. 508.) and that *specific things* devised are never to be considered as satisfaction of a debt, unless so expressed. (2 Eq. C. Abr., title, Devises, pl. 21, cited Bac. Abr., Legacies, D.) . . .

In the case at bar, the consideration for the legacy appears from the will to have been for the services of the legatee. A presumption that the legacy was intended to be a satisfaction of the bond, also, must rest on the fact, that the bond was given for the same services; of which fact there is no evidence before us. It may have been for a different cause. We can only presume that it was for a lawful one.

It appears, also, from the will, that the testator intended his debts and legacies should be paid, before his residuary legatees should take any thing. The pecuniary legacy to the plaintiff, also, is not so much as the debt; and, therefore, cannot be considered as a payment of it. Neither is there any declaration of the testator, that the specific articles given should be considered as a satisfaction of the debt. It appears, also, that there are sufficient assets.

From a consideration of the principles and decisions applicable to this case, we are, therefore, all of opinion that the plaintiff ought to recover.

Defendant defaulted.

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## WINSTON v. WESTFELDT.

(Supreme Court of Alabama, 1853, 22 Ala. 760.)

GOLDTHWAITE, J. The note sued on, at the time of the purchase by Westfeldt, was the subject of controversy in the Chancery Court; and the first question is, whether these proceedings operated as notice to him; or, in other words, does the doctrine of lis pendens apply to negotiable paper? This is entirely a new question with us; and, so far as we can learn, has never been directly decided by any court. The doctrine, as it prevails at this time, seems to have had its origin in the common law rule which obtained in real actions, where, if the defendant aliened during the pendency of the suit, the judgment in the real action overreached the alienation, and the chancery ordinance of Lord Bacon, which provided "that no decree bindeth any that cometh in bona fide by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he comes in pendente lite, and while the suit is in full prosecution, and without any color of allowance, or privity of court, there regularly the decree bindeth. But if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice."—Lord Bacon's Works 2 vol. 479.

From the use of the term "conveyance," we think that the framer of this ordinance had in view its application to real property only, and that it was intended simply to operate as an adoption in the Court of Chancery of the common law rule which we have referred to; and this idea is supported by Mr. Powell, who, in his work on Mortgages (2 vol. 618) says: "There is no case in which equity has determined the property in goods to be affected by reason of a lis pendens, where possession is the principal evidence of ownership, as of personal chattels." Chancellor Kent also, while he admits that the rule is well established, and applies it without hesitation to a sale of bonds and mortgages, as being outside of the ordinary course of traffic, and always understood to be subject to certain equities (Murray v. Lylburn,

2 Johns. Ch. 441, 444), expresses a serious doubt whether it applies to money or commercial paper not due, and some question as to its application to moveable personal property—such as horses, cattle, grain etc. The Vice-Chancellor, in Scudder v. Van Amburgh, 4 Ed. Ch. 29, while he "inclines" to the opinion that the rule applied to personal property, admits that the question is not decided. In our own court, in the case of Bolling v. Carter, 9 Ala. 921, the rule was applied to slaves; but the weight of that case as authority is somewhat diminished, by the fact, that the point was not made, and not alluded to by the court. It is, to say the least, highly improbable that a question of this novel and important character should have passed "sub silentio," had the attention of the court been directed to it.

The question though, here, is not whether the rule applies to personal property, but whether it holds as to negotiable paper transferred before maturity. Lord Eldon evidently doubted it in Jervis v. White, 7 Ves. 413, 414; and from the cautious manner in which he expresses himself, in the last paragraph of Hood v. Aston, 1 Russ. 412, more than twenty years afterwards, we do not think he had fully resolved this doubt. The leaning of Chancellor Kent was against it, on the ground that the safety of commercial dealing required a limitation of the rule; and it must be acknowledged that there is great force in the reason. Negotiable paper, representing, as it does in almost all civilized nations, a very large proportion of the commercial operations, and serving, to a great extent, as the representative of money, is justly a favorite of the law, and enjoys immunities and privileges which are extended to no other species of contracts. The tendency of the courts has been to uphold this description of paper, in the hands of the bona fide holder, against every species of defense which might exist as between the original parties. The credit and confidence due to it must be impaired, if the buyer was required to examine the courts of every county in the State before he could be sure of his purchase; and such would necessarily be the case, if the doctrine of lis pendens applied to it. There are no adjudications to force us to this extremity; the strongest considerations of public policy seem to forbid the extension of the rule to money or bank bills; and we think that commercial paper, as the representative of money, should stand on the same footing in this respect. . . .

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